1879

12-59 April 22 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 276.

THE WYOMING NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THOMAS J. DAYTON.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

FILED OCTOBER 12, 1877.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Wyoming, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between The Wyoming National Bank, plaintiff, and Thomas J. Dayton, defendant, a manifest error hath happened, to the great damage of the said Wyoming National Bank, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that under your seal, distinc'ly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same
2 at Washington on the second Monday of next October, A. D. 1877, on the 8th day thereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this the 28th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL] J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

(Indorsed:) Doc. 1. No. 106. Wyoming National Bank vs. Thomas J. Dayton. Writ of error. Filed May 28th, 1877. J. W. Bruner, clerk supreme court Wyoming Territory.

3 Be it remembered that heretofore, to wit, on the thirtieth day of March, A. D. one thousand eight hundred and seventy-seven, there was filed in the clerk's office of the supreme court of the Territory of Wyoming a transcript and a petition in error, in the words and figures following, to wit:

Petition in error.

TERRITORY OF WYOMING:

Supreme court.

THE WYOMING NATIONAL BANK
vs.
T. J. DAYTON.

The said plaintiff, the Wyoming National Bank, complains of the said defendant, T. J. Dayton, for that the said T. J. Dayton, at the September term of the district court in the second judicial district for the county of Carbon, in the year 1876, recovered a judgement against the said plaintiff by the consideration of said court, in a certain
4 action then pending in said court wherein the said Wyoming National Bank was plaintiff, and the said T. J. Dayton was defendant, a copy of the record and the judgement and proceedings in which case, duly certified, is hereto attached, marked A, and made a

part of this petition; and the said plaintiff avers that there is error in the said record and proceedings in this, to wit:

1st. Because the verdict is not sustained by sufficient evidence, and is contrary to law.

2nd. Because there is error in the amount of the assessment by said verdict in assessing said amount too large.

3rd. Because the damages assessed by said verdict are excessive, and appear to have been given under the influence of passion or prejudice.

4th. Because the court erred in giving to the jury instruction No. 1, requested by defendent.

5th. Because the court erred in giving to the jury instruction No. 2, requested by defendent.

6th. Because the court erred in giving to the jury instruction No. 3, requested by defendent.

7th. Because the court erred in giving to the jury instruction No. 4, requested by defendent.

5 8th. Because the court erred in giving a further instruction to the jury without request on their part, and after they had rendered a complete verdict to the court.

9th. Because the court erred in directing the jury to retire and consider of their verdict after the jury had rendered a complete verdict in the case.

10th. Because the court erred in refusing to give to the jury instruction No. 6, as requested by the plaintiff.

11th. Because the court erred in refusing to give to the jury instruction No. 7, as requested by the plaintiff.

12th. Because the court erred in refusing to give to the jury instruction No. 10, requested by the plaintiff.

13th. Because the verdict received finally by the court is defective in that it does not find whether the defendent has the right of property, or the right of possession only, in the goods taken in this action.

14th. Because the court erred on the trial of this cause in permitting the defendent to introduce in evidence two certain affidavits made for a continuance of this cause, over the objection of the plaintiff.

6 15th. Because the court erred on the trial of this cause in allowing the defendant to give in evidence transcripts of certain judicial records without the same being properly certified; and especially in permit'ing defendant to give to the jury the returns on certain writs of attachments, the same not being certified as required by law.

16th. Because the court erred in permit'ing the defendant to ask the witness C. W. Bramel, on the trial of the cause, the following question: "State, if you know, who owned the wood in controversy on the 8th day of Nov., 1873."

17th. Because the court erred on the trial of the cause in permit'ing the defendant over plaintiff's objection to ask the witness C. W. Bramel the following question: "State what, if anything, you did, as to a delivering of the wood to the railroad company."

18th. Because the court erred in permitting the defendant on the trial of the cause to propound to the witness C. W. Bramel the following question over the plaintiff's objection: "Did you have any transactions with Mr. Ivinson, president of the Wyoming National Bank,

7 in the fall (Nov.) of 1873, in reference to this wood—any conversation about it? If so, state the transactions and the conversation fully."

19th. Because the instructions of the court given to the jury are contradictory and repugnant, and such as to mislead the jury.

The said plaintiff therefore prays that the said judgement may be reversed and the said plaintiff restored to all things he has lost by reason, thereof.

KINGMAN & CORLETT,
Att'ys for Plaintiff.

CHEYENNE, WYOMING,
March 30th, 1877.

Leave is hereby given to the plaintiff in error above, the Wyoming National Bank, to file the above petition in error, with transcript attached, in the supreme court of Wyoming Territory.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

8 (Endorsed on the back as follows:) Wyoming National Bank vs. Thos. J. Dayton. Petition in error. Filed March 30th, 1877. J. W. Bruner, clerk of sup. court.

9 *Petition.*

TERRITORY OF WYOMING,
County of Albany, ss:

District court first judicial district.

WYOMING NATIONAL BANK
vs.
THOS. J. DAYTON. } In replevin.

The said Wyoming National Bank, a corporation duly organized under the laws of the United States, complains of the said Thomas J. Dayton, for that the plaintiff is the owner of the following goods and chattels, to wit: Five hundred cords of fire wood, now lying and being in the wood-yard of the Union Pacific Railroad Co., in Larimie City, in said County, near their round-house, and being all the wood now in said wood-yard that was floated down the Big Larimie River, and is entitled to the immediate possession thereof; and that the said defendant wrongfully and unjustly detains in his possession the said good' and chattels, and from the said plaintiff.

And the plaintiff further avers that the said defendant did so
10 wrongfully detain the possession of the said goods and chattels for the space of thirty days next before the commencement of this action, and wholly deprived the said plaintiff of all use and benefit thereof during all of said time, to the damage of said plaintiff the sum of five hundred dollars.

Wherefore the plaintiff prays an order against the said defendant that he may be ordered to deliver to the plaintiff the said goods and chattels, and also a judgement against the said defendant for the said sum of $500.00, its damages sustained by reason of such unlawful detention.

WYOMING NATIONAL BANK,
By its att'y, J. W. KINGMAN.

(Endorsed:) 369. Wyoming National Bank vs. Thomas J. Dayton. Petition. Filed Jan'y 22nd, 1874. J. W. Bruner, clerk, by J. W. Meldrum, deputy.

11 *Precipe for summons.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, first judicial dist.

WYOMING NATIONAL BANK
vs.
THOMAS J. DAYTON. } In replevin.

To the clerk of said court:

Please issue summons in the above entitled action directed to the coroner of said county returnable as by law required. Damages claimed $500.00.

WYOMING NATIONAL BANK,
By its att'y, J. W. KINGMAN.

(Endorsed on back:) 369. 1st dist. No. 400. Wyoming National Bank vs. Thomas J. Dayton. Filed Jan'y 4th, 1876. J. W. Bruner, clerk, by J. W. Meldrum, deputy cl'k.

12 *Answer.*

TERRITORY OF WYOMING,
County of Albany, ss:

In the dist. court 2nd judicial district.

WYOMING NATIONAL BANK, PL'FF,
vs.
THOMAS J. DAYTON, DEF'T. } In replevin.

The said T. J. Dayton, defendant, now comes, and for answer to the petition of the said Wyoming National Bank, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him, the said defendant, because he saith that he denies all and singular the allegations in said petition stated, in the manner and form as the same are therein set forth, and of this he put himself upon the country.

Further answering the defendant saith that heretofore, to wit, on or about the 17th day of December, A. D. 1873, a writ of attachment issued out of the district court of the first judicial district within and
for the county of Albany, Wyoming Territory, at suit of Simon
13 Durlocher vs. W. S. Bramel, to the sheriff of said county of Albany directed.

And on the same date a writ of attachment issued of the same court at suit of A. T. Williams vs. W. S. Bramel, to the sheriff of said county aforesaid directed.

That on the 16th day of Dec. 1873, a writ of attachment issued out of said court aforesaid at suit of J. Belderbock vs. W. S. Bramel, to the sheriff of said Albany County directed.

And on the same day a writ of attachment issued of said court aforesaid at suit of John W. Connor vs. W. S. Bramel, to the sheriff of said county directed.

And on the day of 187 , a writ of attachment issued out of said court at suit of Thatcher vs. W. S. Bramel, to the sheriff of said county Albany.

And that on the day of , A. D. 187 , a writ of attachment issued out of said court aforesaid at suit of Lewis Miller vs. W. S. Bramel to the sheriff of said county directed.

14 That the total amount for which said several writs of attachment was nineteen hundred twenty-six and $\frac{80}{100}$ dollars; and the defendant further saith that the said W. S. Bramel was then the owner of the said wood, and in accordance with the commands of the said several writs of attachment the said defendant as sheriff of said the county levied upon the said property in the said petition of the said plaintiff stated as the property of the said W. S. Bramel, the said defendant in attachment, and am now and was at the commencement of this said action entitled to the possession of said property, and have a special property therein by reason of said several writs amounting to twenty-three hundred dollars and more, wherefore the defendant prays judgement for said sum of $2,300, interest and costs of suit.

T. J. DAYTON,
Sheriff,
By M. C. BROWN,
His Att'y.

15 (Endorsed on back:) Doc. 2. No. 400. Wyoming National Bank vs. T. J. Dayton. Answer. Filed February 3rd, 1874. J. W. Meldrum, clerk. Filed May 7th, 1875. J. W. Bruner, clerk. Filed Jan'y 4th, 1876. J. W. Meldrum, clerk, by J. B. Adams, deputy.

16 *Amended answer.*

TERRITORY OF WYOMING,
County of Albany, ss:

In the district court 2nd judicial district.

WYOMING NATIONAL BANK, PL'FF,
vs.
THOS. J. DAYTON, DEF'T. } In replevin.

Comes now the said Thos. J. Dayton, defendant, and having first asked for and obtained on his own motion permission of this honorable court and files this his amended answer to the petition of the said Wyoming National Bank, plaintiff.

That the said plaintiff ought not to have his said action thereof against him the said defendant because he saith that he denies all and singular the allegations in said petition of the said plaintiff stated in manner and form as the same are therein averred, and of this he puts himself upon the country. Further answering the petition of the said plaintiff

17 the defendant saith that he denies that the said plaintiff is the owner of the said wood in said petition named and described, and denies that the said plaintiff is entitled to the immediate possession thereof, or any part of the same, and denies that the said plaintiff ever took or held in possession the said wood aforesaid, and denies that he ever unlawfully detained the possession thereof from the said plaintiff.

Further answering, and as a further defence to the said petition of the said plaintiff, the defendant saith that on the 17th day of Dec. A. D. 1873, and before and after that date he was sheriff of Albany County, W. T., duly qualified as by law required, and that on said day and date last aforesaid, to wit, the 17th day of December, A. D. 1873, a writ of

attachment issued out of and under the seal of the district court of the first judicial district within and for the county of Albany, Wyoming Territory, at suit of Simon Durlocker vs. W. S. Bramel, to the sheriff of said Albany County, directed.

18 And on the same date a writ of attachment issued out of the said court aforesaid and under the seal thereof at suit of A. T. Williams vs. W. S. Bramel, to the said sheriff of the said county aforesaid directed.

That on the 16th day of December, A. D. 1873, a writ of attachment issued out of the said court aforesaid and under the seal thereof at suit of T. Bilderdock vs. W. S. Bramel, to the sheriff of said Albany County directed.

And on the same day and date last aforesaid a writ of attachment issued out of the said court aforesaid and under the seal thereof at suit of John W. Connor vs. W. S. Bramel, to the sheriff of said Albany County directed.

And that on the day of , A. D. 187 , a writ of attachment issued out of and under the seal of said court at suit of Thatcher vs. W. S. Bramel, to the sheriff of said Albany County directed.

And on day of , A. D. 187 , a writ of attachment issued

19 out of and under seal of the said court aforesaid at suit of Louis Miller vs. W. S. Bramel, to the sheriff of said Albany County directed.

That the total amount for which said several writs of attachment issued was nineteen hundred twenty-six & $\frac{80}{100}$ dollars.

That the said Thos. J. Dayton, by virtue of his office acting as sheriff of said Albany County, received the said several writs of attachment and by reason thereof and the commands of said writs, levied upon and took into his possession as sheriff of said Albany County, a certain lot of cord wood as the property of the said W. S. Bramel, defendant in said several suits in attachment, the same being the wood described in plaintiff's petition, and that the said T. J. Dayton, as sheriff of said Albany County, by virtue of his office and the several writs of attachment aforesaid, held the said wood in plaintiff's petition mentioned lawfully in his possession at the time this said plaintiff commenced this said action in replevin.

20 And the said defendant further saith that at the time he levied upon the said wood in plaintiff's petition described, as sheriff of said Albany County, by virtue of said seceral writs of attachment, that the said W. S. Bramel, defendant in said attachment suits, was the owner of said wood and in the undisputed possession of the same.

And the said defendant further saith that by virtue of his office as sheriff of said Albany County, and by reason of the said several writs of attachment and the levies made thereunder and the ownership and property in said wood having been in the said W. S. Bramel at the time the said levies were made, that he, as said sheriff, has a special property in said wood of the value of twenty-three hundred dollars

21 and more, and that he has been damaged by the said plaintiff in the said sum of $2,300.00.

Wherefore the defendant prays the judgement of the court for said sum of $2,300.00 with interest and cost of suit.

T. J. DAYTON,
By M. C. BROWN,
His Attorney.

(Endorsed on back:) Doc. 2. No. 400. Wyoming National Bank vs. T. J. Dayton. Amended answer. Filed May 6th, 1874. J. W. Meldrum, clerk. Filed May 7th, 1875. J. W. Bruner, clerk. Filed January 4th, 1876. J. W. Meldrum, clerk, by J. B. Adams, deputy.

22 PLAINTIFF'S EVIDENCE.

Testimony of Edward Ivinson.

Bill of exceptions.

TERRITORY OF WYOMING,
Carbon County, ss:

District court, second judicial dist.

THE WYOMING NATIONAL BANK
vs.
T. J. DAYTON.

Be it remembered that on the trial of this cause in said court of the September term thereof, in the year 1876, the said plaintiff to maintain the issue on his part, offered EDWARD IVINSON, as a witness, who testified as follows:

I am the president of the Wyoming National Bank. I know W. S. Bramel. The bank had business transactions with him in relation to some wood in the year 1874. The bank purchased some wood from W. S. Bramel, Oct.. 30th, 1874. Mr. Bramel came into the bank
23 about one o'clock in the afternoon and wanted some money. I told him we could not let him have any more money. He proposed that I should buy all the wood he had. I told him the bank did not want to buy his wood.

After talking over the matter Bramel proposed to sell 500 cords of the wood. Some of the wood was then in the R. R. yard and some on the bank of the river and some in the river. He proposed to sell 500 cords and after a time I agreed to take that amount, and we went into the back office of the bank to talk the matter over. He wanted to get $500 00 dollars in addition to what he had already got. I told him I would go and see how his account stood, and I found that he owed the bank then about $2,100.00, which had been advanced to him at different times on this same wood. I then offered to let him have $400.00 more conditionally. I offered to give him $400.00 for the 500
24 cords of wood with the condition that the R. R. should take it from me on the same terms, they were to take it from him. If the R. R. Co. would take the wood from me I was to take it and give him $400.00, and he was to put the wood in the R. R. yard.

This we agreed to. He was then delivering the woo'd, and this money was to be applied to putting it in. The bank was to pay $5.00 per cord for it.

After we had made the arrangement, we went out into the front of the bank and the cashier of the bank, Mr. Swain, came in from dinner. I stated the whole transaction over to him in the presence and hearing of Bramel. I told Swain I had bought the 500 cords of wood at five dollars a cord on these conditions, and for them to go down to the R. R. office and see Mr. Strunkland and ascertain if he woo'd take the

25 wood from the bank, and make the vouchers out to us, and if Mr. Shankland would agree to that to come back and pay Mr. Bramel $400.00, being the balance of the $2,500.00.

Bramel and Swain went away together; they came back after a little while and said Mr. Shankland had agreed to it, and would make the voucher out to us. Then Mr. Swain paid Bramel the $400.00. Bramel after that went on putting in this wood, taking it from the river and putting it in the R. R. yard. Under this agreement Bramel was to deliver the wood in the R. R. yard, and he got into and delivered in the R. R. yard about 375 cords and had also about 5, 10, or 15 cords on the river bank. Under this arrangement the defendant Dayton seized this wood on writs of attachments of Durlacker and others, the same 375 cords of wood I bought of Bramel and the wood on the bank.

26 About a month before this action in replevin was commenced. In all these transactions I was acting for the plaintiff bank, and so was Swain. At the time of the commencement of this action Dayton was holding and detaining the wood, and had been about a month.

The wood was at Larimie City, Albany County. Wood of this description and character was at that time and place of the market value of about $4.00 a cord.

And on cross-examination he testified as follows:

We commenced the talk in the front room of the bank, and ended it in the back room. There was considerable talk between us. Bramel said "I will sell you $500.00 cords, and you pay me the difference between what I owe you and what that will come to." The trade properly was not consummated until Swain got back from Shankland's. I told Swain before he started that I had bought the wood under

27 these conditions.

The $2,100.00 was advanced as loans at different times. There was very little of this $2,100.00 paid by the bank for time checks of Bramel's as a speculation. The bank held the note of Bramel for this $2,100.00.

I testified in this case on a former trial. I did testify then as to a settlement and the giving of this note. The note drew three per cent. a month. I did not testify on the former trial that Bramel owed the bank about $400.00 besides this note. The bank took Bramel's note for the $400.00. It drew three per cent. a month.

The bank holds the notes of Bramel for all the money advanced him and still retains them. The notes had not been cancelled or marked paid when this suit was commenced. I handed Bramel the money to pay the men for whom I became security. Bramel went to Fort

28 Larimie. I suppose he came back. I paid the money to him. C. W. Bramel did not pay these men. He borrowed $100.00, and signed his own name and his brother's as att'y. He might have got it to pay men, I do not know.

Here the witness was shown two affidavits made by him for a continuance of this case at a former term of this court in Albany County, and the witness was asked "Are these your signatures? Did you swear to these affidavits?" To which question he answered, "I did. I signed and swore to them."

And on re-examination by plaintiff he answered, the bank took the notes to ballance its cash account. They were not given up because Bramel never came around; never darkened the doors of the bank after the wood was attached; has never been in the bank since. These notes

were taken more as a memorandum than anything else. I wanted
29 Bramel to come to the bank to settle. I went to his house and told his wife to tell him to come to the bank and settle. This was about the time wood was attached. I do not know that he was in the bank after that. I never offered to return the notes.

This was all the testimony of Edward Ivinson.

The plaintiff then, in order to further maintain the issue on his part, offered WILLIAM CROUT as a witness, who testified as follows, to wit:

Testimony of William Crout.

I have resided in Larimie City since 1870. I was in the plaintiff's bank in the fall of 1873, after Bramel's wood drive came down the river. While I was there W. S. Bramel was having a talk with Ivinson. Swain was not there. Bramel said he wanted money to get his wood out of the river. His men would not work. I understood it was wood he had contracted to deliver to the R. R. co. Ivinson agreed to let him have some more money provided it was satisfactory at Mr. Shank-
30 land's office to let Ivinson draw the pay. This is what I understood from what I heard them saying.

They then went into the back room and I stepped out. When I came back Swain was there; they were all three in the back room. Swain and Bramel went to Shankland's office. I had to wait until they came back. They came back soon and said it was satisfactory. Ivinson said he wanted to have the full charge of the wood as soon as it was delivered. It was to be in his charge until the company received it. Bramel wanted him to take the whole of the wood or a lien on it. Ivinson refused. The talk was that Ivinson was to have 500 cords of wood and no one else was to have any control of the wood.

And on cross-examination the witness testified:

I don't recollect whether the talk about the contract was before or after they went to Shankland's office. There was no sale in my
31 presence. I don't remember whether 500 cords was mentioned in my presence. I don't know whether there was a sale or not. Ivinson was to have the proceeds of some wood.

There was no more talk about a sale than this. Ivinson was to have the benefit of the contract of Bramel with the R. R. co., and was to have the money. I don't think there was a sale completed in my presence. I got a general idea of what they were talking.

This was all the testimony of William Crout.

The plaintiff then offered the deposition of A. G. SWAIN, which was read as follows, to wit:

Copy of the deposition of A. G. Swain.

TERRITORY OF WYOMING,
County of Albany, ss:

District court, first judicial dist.

THE WYOMING NATIONAL BANK, PL'FF,
vs.
THOMAS J. DAYTON, DEFENDANT.

32 Deposition of A. G. Swain, of Larimie City, in the county of Al-

bany, in said Territory, a witness on the part of the plaintiff in the above entitled action now pending in said court in the county of Larimie, produced, sworn, and examined before George W. Ritter, a judge of probate in and for the said county of Albany, taken by virtue of the annexed notice.

Said witness, being first duly sworn, deposes and sais, as follows:

Int. first. State your name, age, and residence.

Ans. A. G. Swain; 36 years of age; and I live in Larimie City, Albany County, Wyoming Territory.

Int. second. State whether or not you are about to remove out of the Territory.

Ans. I am; I expect to leave here on Monday or Tuesday next, and am going to California to reside.

Int. third. State whether or not you are acquainted with the parties to this suit.

Ans. I am.

33 Int. fourth. State whether or not you have ever held any office in the Wyoming National Bank.

Ans. I was cashier of the Wyoming National Bank from July, 1872, to March, 1874.

Int. fifth. If you had any conversation or heard any conversation with W. S. Bramel in reference to the purchase of a lot of pine wood, please state all you remember about it and state when it was and where.

Ans. I cannot state the time definitely. I think it was in the fall of 1873. When I came in from dinner into the bank I found Edward Ivinson and W. S. Bramel talking together. Ivinson told me in the presence of Bramel that he had purchased the wood-drive from Mr. Bramel, provided everything would be satisfactory, and wanted to know of me what would be necessary to make the matter binding with the railroad.

34 Bramel said that he would do anything to make the matter satisfactory, as he wanted to get some more money on account of the wood. I told Mr. Ivinson that it would be better on account of the expiration of time of contract between Bramel and the railroad co., that it would be best to see if the railroad company would receive the wood either from Bramel or Ivinson direct; and in case of receiving from Bramel that the vouchers for the wood should be made out to Edward Ivinson. Mr. Ivinson said I had better go down with Mr. Bramel and see Superintendant Shankland to see if the wood would be received in this manner. Bramel and I saw Shankland at his (Shankland's) office, and he agreed to receive the wood from Bramel and make the vouchers out in the name of Edward Ivinson, and called on his clerk, S. L. Mills, to pay attention to the matter, and see that the voucher was made out

35 in Mr. Ivinson's name, as he might forget it. Upon settling the matter satisfactorily, as I considered, I came back to the bank and told Mr. Ivinson of the agreement that had been made between Mr. Shankland, Mr. Bramel, and myself, and, it being satisfactory to him, he told me that when Bramel came in I could let him have the money. Shortly afterwards Mr. Bramel did come in, and I advanced him, I think, $400.00.

Int. sixth. Whose money was it that you advanced to Mr. Bramel at this time?

(Objected to as incompetant and irrelevant.)

Ans. It was the money of the Wyoming National Bank.

Int. seventh. On what books were the charges made?

(Objected to as incompetant, irrelevant, and leading.)

Ans. It was on the books of the Wyoming National Bank.

Int. eighth. Had the Wyoming National Bank advanced any
36 money to said W. S. Bramel on account of this wood; and if so, how much?

(Objected to as being leading, irrelevant, and incompetant.)

Ans. The bank had advanced money to W. S. Bramel on account of this wood to, I think, $2,100.00 to $2,300.00 previous to this advance of $400.00.

Int. ninth. Where was the wood at this time?

Ans. In the Larimie River.

Int. tenth. What was said by W. S. Bramel to Mr. Shankland in reference to this matter, if anything?

(Objected to as being leading, irrelevant, and incompetant, and a repetition of what had already been testified to.)

Ans. When Mr. Bramel and I went down and saw Mr. Shankland, Bramel stated to Shankland that he had sold this wood to Edward Ivinson, and that when the wood was received from Bramel by the company he wanted the vouchers made out in favor of Edward Ivinson.

37 Int. eleventh. State whether, prior to the time the wood was attached by the sheriff, Dayton, he was notified by any one not to attach it, as the wood had been bought and paid for by the bank.

(Objected to as irrelevant and incompetent.)

Ans. One morning before the attachment, I think, Mr. Ivinson called Mr. Dayton, who was passing the bank; he, Ivinson, having been informed that an attachment had been issued, and he notified Dayton not to attach that wood as it was not the property of Bramel, but was the property of the bank. This was in my presence.

Int. twelfth. State whether or not at any time W. S. Bramel agreed to have the attachments dissolved, and what he said in reference to their validity?

(Objected to as incompetent and irrelevant.)

Ans. I do remember at one time something about Mr. Bramel saying he had done nothing to justify an attachment, and that he would
38 see his brother, C. W. Bramel, and Judge Kingman and bust the thing up, or words to that effect.

(This testimony objected to as irrelevant and incompetent as to all answers to questions to which objections were offered.)

Cross-examination by M. C. BROWN, attorney for defendant:

Int. first. Are you sure, Mr. Swain, that when you came into the bank from dinner that Ivinson said to you in Bramel's presence, "I have bought the wood-drive from Mr. Bramel?

Ans. It may not have been in those words, but he said he had bought it provided that the transfer could be made satisfactory.

Int. second. Have you stated all the conversation that occurred there in the bank at that time between Bramel and Ivinson?

Ans. I have so far as I can recollect it.

39 Int. third. Do you remember of having testified in a former trial of this action in the second district court at Larimie City?

Ans. I do.

Int. fourth. Do you remember of stating at that time, in substance, that Mr. Ivinson told me in presence of Bramel that he had made an arrangement with Bramel about the wood and that I should go with Bramel over to Shankland's office and see if the railroad company would

take the wood of Bramel on his old contract and issue the vouchers for the wood to him, Ivinson?

Ans. I think my testimony in the case referred to was the same as it is now, as far as I can recollect.

Int. fifth. State whether you did or did not testify as asked in the preceding question.

Ans. My testimony to-day in substance is the same as the question stated above.

Int. sixth. When you testified in this case before, did you state
40 that Bramel said to Shankland after arriving at his office, and that Bramel then stated the trade to Shankland, just as Ivinson had stated it to you in Bramel's presence before starting over?

Ans. In substance Bramel stated to Shankland the same as Ivinson's statement to me in Bramel's presence before starting over.

Int. seventh. How do you know the $400.00 given to Bramel after he returned from Shankland was the money of the Wyoming National Bank?

Ans. I know it from the fact that I, as cashier of the bank, handled nothing but the money of the Wyoming National Bank.

Int. eighth. You say you charged this money on the books; how did you charge it?

Ans. I charged it to bills discounted, Mr. Bramel having given his note for the amount.

Int. ninth. You say the bank had advanced the money to Mr.
41 Bramel on this wood before this; state what you mean by the bank advancing money, and how and where it was done, and whether Bramel's notes were taken for the advances made?

Ans. I think Mr. Bramel got some money previous to July, 1873, to help pay off his men, and I believe in July, 1873, he wanted some additional money; he came to the bank and gave the bank an order on the Union Pacific Railroad Company for all money due him on account of this wood contract when the wood was delivered, in consideration of which he got a further advance of money from the bank, and whenever he got any money he gave a note for the amount. The notes drew interest at three per cent. per month.

Int. tenth. Did this order of which you speak and Bramel's notes, remain in the possession of the bank at and after the time of this last transaction or purchase about which you have testified?

Ans. Yes; all notes and orders remain in the possession of the bank.

42 Int. eleventh. Do you know when the sheriff attached the wood in dispute?

Ans. I don't remember the day, but am rather positive it was before the attachment had been made that Ivinson and Dayton had this conversation.

Int. twelfth. Do you know that from your own knowledge or from hearsay?

Ans. I can't say.

Re-examination by plaintiff:

Int. one. Was there any arrangement between the bank and Mr. Bramel as to the manner in which his notes and orders should be taken up; if so, what was it?

(Objected to as incompetent and irrelevant.)

Ans. There was an agreement, but I don't know what it was.

A. G. SWAIN.

43 The copy of notice to take this deposition and the copy of the judge's certificate of caption are omitted by agreement of counsel.

Writ of replevin returned & appraisement offered in evidence.

The plaintiff then read in evidence the writ of replevin in this case and the officer's return thereon and the return of the appraissers on the replevin. And then rested his case.

This was all the evidence offered by the plaintiff in chief.

DEFENDANT'S EVIDENCE.

Testimony of S. T. Shankland.

The defendant then, to maintain the issues on his part, called as a witness S. T. SHANKLAND, who testified as follows, to wit:

Swain and Bramel came to my office in Oct. 1873, and Mr. Bramel said he wanted the vouchers made to Mr. Ivinson for the wood. I said I could not issue the vouchers in his name, but would make them payable to Mr. Ivinson. I had prior to that made a contract with
44 Bramel for 500 cords of wood at $5.00 per cord, to be delivered in August previous; none of the wood had been delivered to the R. R. Co. when it was attached. A part of the wood had been placed in the company's yards when it was attached. It had been taken from the river.

And on cross-examination the witness stated.

I called Mr. Mills' attention to the matter, and told him to remember how the vouchers should be made out, so that I should not forget it. This is all that I remember of the conversation.

The above is all the testimony of S. T. Shankland.

The defendant then called as a witness S. L. MILLS, who testified as follows:

Shankland, Bramel and Swain were talking together in the office. Shankland called me to witness that Bramel wanted the vouchers for 500 cords of wood made out to Ivinson. I think that was all that was said.

45 The above was all the testimony of S. L. Mills.

The defendant then called W. S. BRAMEL, who testified as follows, to wit:

Testimony of W. S. Bramel.

I know the parties and the property in controversy. I was the owner of the wood in question—410 cords; it was wood that I run down the Big Larimie River in 1873, and piled in the R. R. wood yard in October, 1873. Shortly after the drive arrived I had a conversation with Ivinson, in which I wanted to sell him the whole of the drive or give him a mortgage on it. He said he could not go into the wood business. We then had some talk as to a 500 cords which I had contracted to sell to the R. R. Co., to be delivered in August at $5.00 a cord, but I did not get down in time. Some time before that I had given an order on the R. R. co. to pay the voucher to Ivinson, and then I got some money; don't remember how much. When the drive got in I went to him for
46 more money; he refused to let me have any more. We talked

the matter over for several days; Ivinson finally told me that I might revoke the order I had given; and he said if I would go to Shankland and get him to make the voucher payable to Ivinson direct he would let me have more money; $400.00 was the amount agreed on.

This conversation occurred in the back room of the bank. When Swain came in Ivinson told him to go with me to see Shankland. He told Swain that I had agreed to have the vouchers made out directly to him (Ivinson), and that he had agreed to let me have $400.00 more, provided Shankland would agree to receive the wood as per contract for August, which was forfeited at that time, and make out the vouchers to him (Ivinson). Swain and I went to Shankland's office, and I told Shankland that I had got some money of Mr. Ivinson, and wanted to get some more, and in order for him to advance more money
47 I had agreed to have the vouchers for this wood made directly to Ivinson, instead of making it to me.

Shankland called up Mills to witness, and there was then stated in Mills' presence the contract between Shankland, Ivinson, Swain, and myself; the same contract I had made with Ivinson in the bank, that the vouchers should be made to Ivinson instead of me. I don't think the word sale was mentioned in Shankland's office. I have stated in substance all that was said there. Ivinson told Swain that he had agreed to let me have $400.00, provided the vouchers was made to him directly. He said nothing to Swain about a sale of the wood that I recollect of. Nothing was said in Shankland's office about a sale.

I think I have stated all the material parts of the conversation at the bank and at Shankland's office. At the time the attachments
48 were levied there was 410 cords of wood in the R. R. yard; it had not been received by the company.

I was the owner of the wood prior to receiving the $400.00. I was indebted to the bank and gave them my note for $1,800.00 and odd dollars on a settlement. Some of it was for money loaned, and some of it was for time checks; most of it was for time-checks they had bought up; that note has never been paid. Some days after the attachments were levied, Ivinson came to my house to get me to come to the bank; I did not go; I saw Swain in the street afterwards, and he asked me into the bank to talk about the attachments. He wanted me to take steps to dissolve the attachments. He wanted to see what I would swear to about the attachments. Ivinson came into the bank, spake a word or two; did not say much—he was cleaning a rifle. The notes were not spoken of at the time.

I believe the wood attached was all the wood I owned at that time unless it was some on the river-bank.

A few days before the attachments were levied I sold all the wood in the river to Charles Hutton.
49 Ivinson never paid a man a dollar so long as I had to do with the wood, and never guaranteed the payment.

Some men followed me into the bank, and I got some money and paid them; I gave my check for the money. I know Simon Durlocker; his claim was just, so far as I know. I owed J. W. Connor and A. T. Williams. J. Bilderback's claim was honest; can't say how much it was. I owed Thatcher a balance on time-checks. Can't say how much I owed L. Miller. The papers served on me were correct into a few cents. In all the cases where I was sued, I think the amounts claimed were about correct. I never told Swain there were no grounds for the attachments. I had no particular reasons for not resisting the attachments; I did not

resist them because I did not suppose I could save anything. I gave up everything to my creditors.

50 And on cross examination the witness testified:

I think when I got the $400.00 I left a part of it on deposit; can't say whether I did or not; it was not left long at any rate. I think I had a deposit there before that; I don't recollect distinctly as I ever drew more than one check. I had no deposit in the bank as late as Dec. of that year, or a dollar in the world anywhere.

The witness was then shown a check on the bank, which he said was his check, and on which he got the money, which was then read to the jury.

Copy of check shown.

$113\frac{85}{100}$.] LARIMIE CITY, WYO. TERR., *Dec. 13th*, 1873.

Wyoming National Bank pay to W. S. Bramel, or bearer, one hundred and thirteen $\frac{85}{100}$ dollars.

W. S. BRAMEL.

Across the face: Wyoming National Bank. Paid Dec. 13th, 1873.

[Stamp.]

51 That was the time the men followed me into the bank. I used the money to pay the men who were working on the wood; I paid some of them there in the bank; don't think I put any security in the bank for this check; it has never been paid to the bank.

The witness was then shown an order on the U. P. R. R. Co., which he said was the order which he gave the bank, and was his signature.

The order was then read to the jury as follows:

Copy of order.

LARIMIE, WYO., *July 22nd*, 1873.

Cashier U. P. R. R. Co., Omaha, Neb., please pay the Wyoming National Bank or order any amount that may become due on contract for 500 cords of wood, to be delivered at Larimie during the month of August, 1873.

W. S. BRAMEL.

52 I don't know but that I gave the $1,800.00 note at that time. On the 30th of Oct. I wanted to get $500.00, but they would give me only $400.00. They did all the figuring; I did not cast the interest on the $1,800.00 note; they may have done it.

The reason stated for taking out the attachments was that I was putting a part of my property out of the reach of my creditors.

The attachments were made the same day that I gave a bill of sale of the wood in the river to Charles Hutton; I don't pretend to say that I had not placed some of my property where my creditors could not reach it. I told Kingman I had never tried to defraud my creditors; I afterwards gave it all up to my creditors. Hutton was to pay me $4,000.00 for the wood in the river, but I did not get it, for a lot of it went down the river and was lost. I don't know how much wood Hutton sold. I might have given another order to the bank more binding than
53 the first one.

The witness was then shown another order, which he identified as an order given the bank by him.

The following order was then read to the jury:

Copy of second order.

LARIMIE, WYO., *Sept. 11th*, 1873.

Mr. C. A. BUSSARD, Esq.,
Larimie City:

Upon completion of the sale of any of my wood, and upon the receipt of the money, pay to the order of the Wyoming National Bank out of the first proceeds eighteen hundred and forty-nine and $\frac{65}{100}$ dollars, with interest added thereon at the rate of two per cent. per month from the date of this instrument, taking up my promissory note bearing even date herewith for the amount and interest as above specified, holding same as a receipt against me.

W. S. BRAMEL.

54 I gave this order preparitory to going to Ft. Larimie. It was given to secure the $1,800.00 note. Bussard thought he could sell the wood.

This was all the testimony of W. S. Bramel.

The defendant then offered the two affidavits of Edward Ivinson, which had been before identified. The plaintiff objected to the reading of these affidavits, because they were offered only for the purpose of contradicting the testimony of Ivinson, and no sufficient foundation had been laid for that purpose, and no opportunity had been given the witness to explain.

The objections were overruled by the court, and the affidavits read to the jury as follows, to wit:

Motion for continuance.

TERRITORY OF WYOMING,
Albany County, ss:

District court, second judicial district.

55 WYOMING NATIONAL BANK } In replevin.
vs.
THOS. J. DAYTON. }

And now comes the plaintiff and moves the court for a continuance of the above-entitled case for the reason that two witnesses, without whose testimony the plaintiff cannot safely go to trial, cannot be obtained at this term.

WYOMING NATIONAL BANK,
By its Att'y J. W. KINGMAN.

Affidavit of Edward Ivinson.

I, Edward Ivinson, being first duly sworn, depose and say:

That I am the president of the said Wyoming National Bank; that we cannot safely go to trial at the present term on account of the severe sickness of Mr. Shankland, which precludes him from leaving his house, and the unexpected absence of Mr. A. G. Swain; that Mr. Shankland
56 was taken suddenly very sick since the commencement of this term of court, and has ever since been to' ill to give a deposition; that Mr. Swain left last week very unexpectedly for Chicago, to be absent about two weeks; that when I learned he was about to leave,

I applied to the clerk of this court for a subpœna. and directed the sheriff to serve it; the subpœna was put into the sheriff's hands, but before he had served it the news came that the prisoners had escaped from the penitentiary, and he left at once, as was his duty, to assist in recapturing them, and before he returned Mr. Swain had left; that if present I believe Mr. Swain would testify that he has been the cashier of the plaintiff bank; that said bank had advanced to W. S. Bramel or loaned him about $2,000.00 up to the time when the wood in controversy came down the Big Larimie River; that soon after that the said
57 W. S. Bramel came into the bank and said he must have some more money; the bank was unwilling to make any more loans or advances on account of said wood, and declined his proposition.

Mr. Bramel then agreed with said Swain to sell to the bank the 500 cords of wood that he had partially contracted to sell to the U. P. R. R., so that the bank could sell and deliver it to the railroad and get the vouchers for it, provided the bank would advance to said Bramel $400.00 more, and would pay for taking the wood out of the river, hauling it up to the R. R. wood yard, and cutting and splitting and cording it up.

That said Swain and Bramel went together to the railraod office, saw Mr. Shankland, and agreed with him to receive said 500 cords of wood from the bank and issue the vouchers therefor to said bank.

That after that, and in consequence of said agreement, and of the arangement made with said Shankland, the bank advanced to W. S. Bramel
58 said $400.00, and paid the cost and expence of taking said wood out of the river, hauling it to the railroad and cutting, splitting and piling it up, amounting to something over two hundred dollars in addition.

That as this business was done by Mr. Swain and was under his particular charge, there are many additional facts in his knowledge, and which will be of great importance to the plaintiff in this case, which this affiant is unable to state. That said Shankland would corroberate and confirm the statements of said Swain in relation to the purchase of said wood from said bank, and agreeing to issue the vouchers therefor to said bank.

EDWARD IVINSON.

Subscribed and sworn to before me this 19th day of March, 1874.

J. W. MELDRUM,
Clerk of District Court.

Second affidavit for continuance read to the jury, as follows:

I, Edward Ivinson, being first duly sworn, depose and say, in
59 addition to my former affidavit, that the witnesses Shankland and Swain reside in Larimie City, and that I have no doubt they can both be produced to attend as witnesses at a subsequent term of this court, and that their absence has not been procured by the act or connivance of the plaintiff nor by others at its request, nor with its knowledge or consent, and that this affiant believes the witnesses will prove the facts set forth in his former affidavit, and many additional facts in relation to the purchase and sale of the wood replevied, but which this affiant cannot particularly set forth, because they are not specially known to this affiant. But this affiant believes such contract of sale was made by said Swain as an officer of said bank, with said Bramel, and also with said Shankland for said U. P. R. R.

And this affiant also believes the facts stated in his former affidavit

are true as stated by him therein, and this affiant knows of no
60 other witnesses by whom these facts can be proved.

And this affiant believes that great injustice may be done to this plaintiff by forcing him to trial without the personal attendance of the said witnesses, because the contract of purchase and sale of said wood by said plaintiff, and the contract of sale to U. P. R. R., were both made by said Swain, and by him alone on the part of said bank, and it is not possible for the said plaintiff to procure an affidavit at this time that shall fully and properly set forth the facts, or contain the evidence in the knowledge and possession of said Swain or of said Shankland.

EDWARD IVINSON.

Subscribed and sworn to before me this 21st day of March, A. D 1874.

J. W. MELDRUM,
Cl'k Dist. Court.

The defendant then read in evidence the certificate of election bond and oath of office of T. J. Dayton, as sherriff of Albany County.
61 copies of which are omit'ed from this bill of exceptions by agreement of counsel, no question of law arrising about them.

The defendant then called C. W. Bramel as a witness, who testified as follows.

Testimony of C. W Bramel.

I know the parties; Dayton was sheriff of Albany Co unty, from 1872 to 1874. I know the wood, I had considerable to do with the wood that came down the river as Bramel's agent.

The following question was then propounded to the witness (objected to by pl'f and objection overruled by the court; exception taken and noted), "Did you have any transactions with Mr. Ivinson, president of the Wyoming National Bank in the fall (Nov.) of 1873, in reference to this wood, any conversations with him about it? If so, state the conversations and the transactions fully?

To which the witness answered: "I had considerable to do
62 with the wood in controversy as well as all the wood that came down the river. During my connection with the transaction, my means being exhausted, I went to the bank to raise means to fill a contract previously made with the R. R. Co. Ivinson and Swain were both in the bank; my conversation was with Swain. He called Ivinson out of the back room. This was Nov. 8th, 1873, I told them my authority and showed them my power of att'y from W. S. Bramel. At that time I wanted to raise money enough to pay off all the men working on the wood drive. The bank refused to advance any more money unless further security was given.

I stated there was some controversy with the R. R. Co. as to their receiving the 500 cords, because it was not put in as soon as it should have been. Either Swain or Ivinson stated there was no danger, but that the R. R. Co., would take the 500 cords. I proposed to give
63 the bank a bill of sale of all the wood owned by W. S. Bramel, or mortgage it conditioned that the R. R. Co. should have the 500 cords of wood, and Ivinson or the bank should have the money for it. I said emphatically I did not want to interfere with any previous arrangements they had made with W. S. Bramel.

To the best of my recollection, Mr. Ivinson said he wanted nothing to do with the wood, but proposed to loan the money on my own note. I

afterwards gave W. S. Bramel's note for $100.00, and I endorsed it. Mr. Ivinson regarded it as a loan to me; as W. S. Bramel was not worth anything. I got $100.00 only because I did not want to ask anyone to endorse for me, and applied it to getting in wood for the R. R. Co., and stated at the time it was to pay the men.

The following question was then propounded to the witness to which the plaintiff objected, but the objection was overruled by the
64 court & the exception noted: "State, if you know, who owned the wood in controversy on the 8th of Nov., 1873.

To which the witness answered: "W. S. Bramel owned the wood and I had controll and supervision over it. The title did not pass to the R. R. Co. until it was all delivered and received by them."

The following question was then put to the witness, to which the plaintiff objected, but the objection was overruled by the court and exception noted: "State what, if anything, you did as to the delivery of the wood to the R. R. Co."

To which the witness answered: "I deliver' the wood; that is, men under me did, to the R. R. Co., in the yard where the R. R. Co. designated. 500 cords were not delivered when it was attached."

65 And on cross-examination the witness testified:

I was not present at the time of the alleged conversation in the bank when the wood is alleged to have been sold.

This is all the testimony of C. W. Bramel.

Writs of attachment offered in evidence.

The defendant then offered copies of the several writs of attachment mentioned in his answer in this case, with the returns thereon, by virtue of which it was alleged the wood in question was attached, together with the clerk's certificate on the copies.

To the introduction of these copies the plaintiff objected on the ground that they were incompetent, not properly certified, and particularly to the returns as not certified at all.

The objection was overruled by the court, the exception noted, and the writs, returns, and certificates read to the jury as follows, to wit:

Copy of first writ of attachment.

66 TERRITORY OF WYOMING,
County of Albany, ss:

SIMON DURLOCHER, PLAINTIFF,
vs.
W. S. BRAMEL, DEFENDANT.

Writ of attachment in call of Durlocker vs. Bramel.

To the sheriff of Abbany County, greeting:

Whereas Simon Durlocher has complained, on oath, to J. W. Meldrum, dep'ty clerk of the district court of Albany Co., that the above-named defendant is justly indebted to the above-named plaintiff to the amount of $1,038.81 *dollars*, and oath having been made that the said defendant is about to convert his property or a part thereof into money

for the purpose of placing it beyond the reach of his creditors, and the said plaintiff having given bond and security according to law: You are therefore commanded to attach and safely keep all the property of the said W. S. Bramel within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand of
$1,038.81 *dollars* and costs, unless the defendant give you security
67 by the undertaking of at least two sufficient sureities in an amount
sufficient *sufficient* to satisfy said demand and costs, in which case to take such undertaking and in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to law, at a court to be holden at Larimie, for the county of Albany, upon the first Monday of March, A. D. 1874, and make return of this writ according to law on the 26th day of Dec., 1873.

Witness.

[SEAL.]

J. W. BRUNER,
Clk of said Court,

and the seal thereof, at Larimie, this 16th day of *of* Dec., A. D. 1873.

J. W. BRUNER,
Clk of Dist. Court, Albany Co.,
By J. W. MELDRUM,
Deputy Clerk.

Copy of officer's return thereon.

TERRITORY OF WYOMING,
County of Albany, ss:

I hereby certify that I received the within writ of attachment
68 on the 16th day of December, 1873, at 9 o'clock a. m., and executed the same, at Albany County aforesaid, on the 16th day of Dec., 1873, by delivering a true copy to W. S. Bramel, the within-named defendant, and attaching and taking into my possession 450 cords of wood more or less, the property of W. S. Bramel, the within-named defendant.

T. J. DAYTON,
Sh'ff of Albany County.

Copy of clerk's certificate attached to above writ and return.

TERRITORY OF WYOMING,
County of Albany, ss:

I, J. W. Meldrum, clerk of the 2nd district court in and for said county, in the Territory aforesaid, do hereby certify that the foregoing is a true, full, and correct copy of the petition, summons, and writ of attachment in the within-entitled cause as the same remains on file in this office.

Witness my hand and the seal of said court, at Larimie City, this 20th day of Dec., A. D. 1875.

J. W. MELDRUM,
Clerk of said Court.
By WALTER SINCLAIR,
Deputy.

69 The defendant also introduced and read to the jury like copies of the writs of attachment, officer's returns, and clerk's certificates in the following cases, full copies of which are omit'ed in this bill of exceptions by agreement of counsel:

Other writs of attachments.

A. T. WILLIAMS }
vs.
W. S. BRAMEL. }

Writ dated Dec. 17th, 1873; amount claimed $151.29.

J. M. THATCHER }
vs.
W. S. BRAMEL. }

Writ dated Jan'ry 3rd, 1874; amount claimed $87.33.

LOUIS MILLER }
vs.
W. S. BRAMEL. }

Writ dated Jan'ry 3rd, 1874; amount claimed $168.30.

JOHN W. CONNOR }
vs.
W. S. BRAMEL. }

Writ dated Dec. 16th, 1873; amount claimed $192.67.

J. BILDERBOCK }
vs.
W. S. BRAMEL. }

Writ dated Dec. 16th, 1873; amount claimed $238.40.

The defendant then announced that he had no further evidence to offer, and rested his case.

The plaintiff did the like, and the evidence closed.

70 The foregoing is all the evidence offered on the trial of the case by either party, and is all the evidence in the case.

The parties then requested the court to instruct the jury, in writing and each submitted written requests for instructions as follows, to wit:

Instruction to jury requested by defendant.

The defendant requested the court to charge the jury—

No. 1st. To entitle the plaintiff to recover in this action he must establish by a preponderance of evidence two facts: first, that the Wyoming National Bank was entitled to the immediate possession of the wood in question; and second, that the defendant Dayton was wrongfully detaining the same at the time this action was commenced. Under the pleadings and evidence in this case the right of possession depends upon title and ownership therefor. If the jury find from the evidence in this case that the plaintiff, the Wyoming National Bank, was not the owner of the wood in question at the time the writ of replevin issued in this case, the jury must find for the defendant and assess such dam-

71 ages as they may think right and proper.

To the giving of this instruction the plaintiff excepted at the time the instruction was given.

No. 2. No sale of personal property is good prima facie as against bona fide attaching creditors or innocent purchasers without a delivery of the goods and chattels sold, and if the jury believe from the evidence in this case a contract of the wood in question was made between W. S. Bramel and the Wyoming National Bank, but previous to delivery of the wood to the bank it was attached by the creditors of Bramel, then sheriff Dayton, the defendant in this suit, was not wrongfully detaining the property in question and is entitled to recover damages in this action.

To the giving of this instruction the plaintiff excepted at the time the instruction was given.

No. 3. If the jury believe from the evidence in this case that there was a contract between W. S. Bramel and the Wyoming National Bank to transfer the proceeds of the wood only to the bank, such con-
72 tract did not constitute a sale of the wood or pass to the bank the title, ownership, or right of possession thereof.

To the giving of this instruction the plaintiff excepted at the time the instruction was given.

No. 4. The measure of damages in this case if the jury find for the defendant must be the amounts claimed and for which the several writs of attachment issued against W. S. Bramel with legal interest thereon, to wit, twelve per cent. from the time the writs issued, provided the value of the property in question equals or exceeds that amount.

To the giving of this instruction the plaintiff excepted at the time the instruction was given.

The plaintiff requested the court to charge the jury as follows, to wit, but the court refused:

Instruction requested by plaintiff and refused.

No. 6. There is no competent evidence before the jury that the defendant, Dayton, ever levied upon and took into his possession the wood in controversy in this action, and the court instructs you that so
73 far as any rights of the defendant are based upon such defence, they are not made out.

To the refusal of the court to give this instruction the plaintiff excepted at the time of such refusal by the court.

No. 7. There is no competent evidence before you that the defendant, Dayton, by virtue of the writs of attachment described in the defendant's answer, levied upon and took into his possession the wood in controversy in this action, and you can award him no rights whatever by virtue of such claim.

To the refusal of the court to give this instruction the plaintiff excepted at the time of such refusal by the court.

No. 10th. The attaching creditors of W. S. Bramel could obtain by the service of the writs of attachment described in the answer in this action, if it has been shown that there were any such creditors, no better or higher right than said Bramel had in the property in controversy in this action. At the time of the service of said writs of attach-
74 ment, if said writs of attachment were served, the right which such creditors would obtain by the service of said writs of attachment would be at most but a lien, which in law is postponed to all prior liens, whether equitable or legal, which have been or were asserted before said property was sold on execution.

To the refusal of the court to give this instruction the plaintiff excepted at the time of such refusal.

The pl'ff also requested the court to give the following instructions to the jury, which were given as requested, and numbered by the court from 6 to 13 inclusive:

Instructions given to jury on request of plaintiff.

No. 6. That the defendant, Dayton, claims a special interest and ownership in the property replevied in this action by virtue of levies upon the same by virtue of certain writs of attachment as set forth in the answer of the defendant.

If you find that such levies were made by the defendant, then the court instructs you that the defendant, Dayton, by means of such
75 levies could get no better or greater interest in the property so levied on than W. S. Bramel, the defendant named in such writs of attachment, had at the time such levies were made.

No. 7. If you find from the evidence in this case that W. S. Bramel, the defendant named in the writs of attachment, by virtue of which the defendant alleges he levied upon and took into possession the property in controversy in this action for a valuable consideration rec'd by him from the plaintiff, agreed with the plaintiff that the consideration to be paid for said wood by the Union Pacific Railroad Company to said Bramel (if any such consideration was to be paid), should be paid to the plaintiff, and that any voucher for said wood should be made payable to said plaintiff; and in addition agreed with the plaintiff to deliver said wood to said railroad company for the benefit of the plaintiff, and if such agreement with the plaintiff was made before the defendant levied upon and took possession of said wood, if it was so levied upon and taken into possession, then the court instructs you that any right which the defendant obtained by such alleged levies would be
76 subject to the obligation of said Bramel in relation to said wood, and the agreement of said Bramel with said plaintiff would have to be performed and carried out before the defendant could obtain any right or interest in said wood by virtue of levies made under the writs of attachment described in defendant's answer.

No. 8. So far as the defendant in this action makes any claim to the wood in controversy in this action by reason of having levied upon and taken possession of the same by reason of certain writs of attachment, that defence on the part of the defendant is an affirmative one, and the defendant, before he can recover in this action by reason of such defence, must prove the same by a preponderance of evidence, and if it is not so proved by a preponderance of evidence, then you cannot find for the defendant upon that defence.

No. 9. In case you find for the plaintiff in this action you shall assess adequate damages to the plaintiff for the illegal detention of the property; such damages would be the interest on the value of the property at 12 per cent. per annum during the time the wood was so detained by the defendant, if it was so detained.

77 No. 10. If the plaintiff in this action purchased the wood in controversy in this action from W. S. Bramel before the defendant levied upon the same, if he did so levy, and if said wood was delivered at place agreed on between said Bramel and the plaintiff before any such levy was made, then the defendant acquired no right whatever to said wood by such levy, and you should in that case find for the plaintiff.

No. 11. The court instructs you that the defendant's defence that he was entitled to the wood in question by reason of levies made by virtue

of certain writs of attachment is not a good defence in this action unless the evidence in the case shows you that such levies were made upon the identical and same wood replevied in this action, and you cannot take it for granted that the wood so replevied is the same wood that was levied on by the defendant, but such fact must have been proved to you by the evidence in this case.

No. 12. The court instructs you that the defendant, Dayton, in levying upon the property in controversy (if you find he did so levy)
78 with the writs of attachment described in the answer in this action acquired only such interest in said property as W. S. Bramel then had in the property, and such levies by the defendant would be subject to any valid contracts made by said Bramel in respect to said property at the time such levies were made.

No. 13. If the jury find for the plaintiff in this action the form of the verdict should be as follows:

WYOMING NATIONAL BANK, PL'FF,
vs.
THOS. J. DAYTON, DEFENDANT.

We, the jury, find for the plaintiff and assess its damages at $

Foreman.

Instruction given to jury on motion of court.

The court also instructed the jury in writing, on its on motion, as follows:

Charge of the court to the jury.

GENTLEMEN OF THE JURY: The petition in this cause sets up fully the cause of action or the claim of the plaintiff, and the answer of the defendant sets up the defence to the *to the* plaintiff's action on the part of the defendant. The facts in the case are few, and by applying the law to them given you by the court you will have, I think, but
79 little difficulty in arriving at a just and proper verdict. Counsel have requested the court to give you certain instructions. I have marked them "instructions given" and numbered them from one to thirteen inclusive, and made them a part of this charge, and you will consider them as such.

You are the sole judges of the weight of evidence and the credibility of witnesses. The instructions refer'ed to above contain the law of the case, and I have not deemed it necessary to add anything more.

J. B. BLAIR,
Judge D. C.

The foregoing are all the instructions either given or refused in the case before the jury retired.

The jury then retired to consider of their verdict, and after some time came into court and returned the following verdict:

First verdict of jury.

THE WYOMING NATIONAL BANK }
vs.
THOS. J. DAYTON, DEFENDANT. }

We, the jury, find for the defendant and assess his damages at $1,900.00 with interest from the date of the writ of replevin.

A. T. PETERSON,
Foreman.

80 The court then gave the jury the following additional instructions in writing and sent them out again to reconsider of their verdict.

To which proceeding the plaintiff then and there excepted, and also excepted to the instructions given and to any further instructions being given to the jury unless requested by them.

Additional instruction given to jury.

Copy of additional instructions.

If the jury find for the defendant, they should also find whether the defendant has the right of property or the right of possession only at the commencement of the suit, and if they find either in his favor they shall assess such damages as they think right and proper.

The jury then retired again to their room, and after some time again came into court and returned the following verdict:

Second verdict of jury.

WYOMING NATIONAL BANK }
vs.
THOS. J. DAYTON, DEFENDANT. }

We, the jury, find for the defendant. We also find that the defendant had the right of property by possession only at the commencement of this suit, and assess his damages at twenty-five hundred ($2,500.00) dollars.

A. T. PETERSON,
Foreman.

81 To which verdict the plaintiff excepted, because it was defective in not finding whether the defendant had the right of property or the right of possession only in the property replevied, and also because the jury having returned one complete verdict in this case could not be permitted to return another.

But the objections were overruled by the court, and the last verdict recorded as the verdict in this case.

The plaintiff then filed the following motion for a new trial, which having been argued was overruled by the court.

Motion for a new trial.

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court, second judicial district.

WYOMING NATIONAL BANK, PLAINTIFF,
vs.
THOS. J. DAYTON, DEFENDANT.

And now comes the said plaintiff and moves the court now here to vacate the verdict *the verdict* of the jury heretofore rendered and fixed in this cause and to grant a new trial for the following reasons, to wit:

82 1. Because said verdict is not sustained by sufficient evidence and is contrary to law.

2. Because there is error in the assessment of the amount of recovery by said verdict in assessing the amount too large.

3. Because the damages assessed by said verdict are excessive and appear to have been given under the influence of passion and prejudice.

4. Because the court erred on the trial of the cause in giving to the jury "Instructions No. 1" as requested by defendant.

5. Because the court erred in giving to the jury "Instruction No. 2" requested by defendant.

6. Because the court erred in giving to the jury "Instruction No. 3" requested by defendant.

7. Because the court erred in giving to the jury "Instruction No. 4" requested by defendant.

8. Because the court erred in giving to the jury a further instruction without request on their part, and after the jury had rendered a complete verdict to the court in the case.

83 9. Because the court erred in directing the jury to retire and consider of their verdict after the jury had rendered a complete verdict in the case.

10. Because the court erred in refusing to give to the jury on the trial of this cause "Instruction No. 6" as requested by the plaintiff.

11. Because the court erred in refusing to give to the jury "Instruction No. 7" as requested by plaintiff.

12. Because the court erred in refusing to give to the jury "Instruction No. 10" requested by plaintiff.

13. Because the verdict received finally by the court is defective in that it does not find whether the defendant had the right of property or the right of possession only in the goods taken in this action.

14. Because the court erred on the trial of this cause in permitting the defendant to introduce in evidence two certain affidavits made for a continuance of this cause by one Edward Ivinson over the objection of plaintiff, without laying any proper foundation for their introduction.

84 15. Because the court erred on the trial of this cause in allowing the defendant to give in evidence transcripts of certain judicial records without the same being properly certified, and especially in permitting the defendant to give to the jury the returns on certain writs of attachment, the same not being certified as required by law.

16. Because the court erred in permitting the defendant to ask the witness C. H. Bramel on the trial of the cause the following question:

"State if you know who owned the wood in controversy on the 8th day of Nov., 1873."

17. Because the court erred on the trial of this cause in permitting the defendant, over plaintiff's objection, to ask the witness C. W. Bramel the following question: "State what, if anything, you did as to the delivery of the wood to the railroad company."

18. Because the court erred in permitting the defendant on the trial of this cause, over plaintiff's objection, to propound to the witness C. W. Bramel the following question: "Did you have any transactions
85 with Mr. Ivinson, president of the Wyoming National Bank, in the fall (November) of 1873 in reference to this wood—any conversations about it? If so, state the transactions and conversations fully."

19. Because the instructions of the court given to the jury are contradictory and repugnant and such as tended to mislead the jury.

J. W. KINGMAN & W. W. CORLETT,
Att'ys for Plaintiff.

Which motion having been overruled, the court ordered judgment to be entered on said last mentioned verdict.

To all which orders, rulings, and judgments the plaintiff excepted as above set forth.

Bill of exceptions allowed.

And now, on this 22nd day of September, A. D. 1876, the same being one of the regular days of the September, A. D. 1876, term of said district court, this bill of exceptions is allowed and signed by the court and ordered to be made a part of the record in this cause.

All of which is done in open court this 22nd day of September, A. D. 1876.

86 [SEAL.] (Signed) JACOB B. BLAIR,
Associate Justice of the Supreme Court and Judge of the Second Judicial Dist., Wyoming Territory.

(Endorsed on back as follows:) The Wyoming National Bank vs. Tho's J. Dayton. Bill of Exceptions. Filed Sept. 22nd, 1876. J. W. Meldrum, clerk, by J. B. Addoms, dep'ty.

87 *Copies of journal entries.*

At a regular term of the district court of the second judicial district, begun and held at Rawlins, within and for the county of Carbon and Territory of Wyoming, on the 11th day of September, A. D. 1877, there was present the Hon. Jacob B. Blair, one of the associate justices of the supreme court of Wyoming Territory and sole judge of this court; D. F. Rannel, sheriff; Homer Merrill, prosecuting attorney; and J. B. Addoms, deputy clerk.

Be it remembered that the following proceedings were had, to wit:

* * * * * * *

WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

RAWLINS, WYOMING, *Sept. 15th*, 1876.

This cause coming on to be heard this the 14th day of Sept., 1876, it being one of the regular days of the Sept., 1876, term of said court, upon

the petition of the plaintiff and upon the amended answer of the said defendant, the following named jury was duly drawn, tried,
88 empaneled, and sworn, viz: A. T. Peterson, John Durant, J. C. Miller, Robert Adoms, Geo. B. Campbell, N. M. Curtis, John Leof, Fred. Bruden, H. Bouck, Sam'el Morgan, James Hanson, and James Smith.

Pending the trial of this cause court adjourned until Sept. 16th, 1876

WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

SEPTEMBER 16TH, 1877.

This trial of this cause was proceeded with.

WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

RAWLINS, *Sept. 18th*, 1876.

The trial of this cause was proceeded with.

SEPT. 19TH, 1876.

The testimony having been heard and arguments having made by counsel, the jury in this cause, viz, Wyoming National Bank vs. Tho's J. Dayton, retired under charge of a sworn officer.

89 WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

Comes now the jury heretofore empaneled in this cause, who, upon being called, are found to be all present, and returned their verdict into court, which said verdict was in the following words and figures, viz:

Verdict of jury.

WYOMING NATIONAL BANK, PLAINTIFF,
vs.
THO'S J. DAYTON, DEFENDANT.

We, the jury, find for the defendant. We also find that the defendant had the right of property by possession only at the commencement of this suit. We assess his damages at twenty-five hundred dollars ($2,500.00).

A. T. PETERSON,
Foreman.

Judgment.

WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

SEPTEMBER 22ND, 1876.

This cause coming on to be heard upon the motion of plaintiff

90 to set aside the verdict and grant a new trial, and argument having been made by counsel on either side, and his honor being well advised in the premises, overruled the said motion; it is therefore considered by the court that the said defendant recover from the said plaintiff the sum of twenty-five hundred dollars heretofore found due from said plaintiff to defendant by the jury in their verdict heretofore returned in this case, and also his costs in about this suit in this behalf expended, taxed at $377.55.

Certificate of clerk authenticating record.

TERRITORY OF WYOMING,
County of Carbon, ss:

WYOMING NATIONAL BANK
vs.
THO'S J. DAYTON.

I, J. W. Meldrum, clerk of the dist. court of the second judicial district, do hereby certify that the above and foregoing is a true and correct transcript of the petition, precipe, answer, amended answer, bill of exception, and journal entries in the above entitled cause so full
91 and entire as the same appear and remain upon the records and files of my office.

Witness J. W. Meldrum, clerk of said court and the seal thereof at Rawlins this 26th day of March, 1877.

{ DISTRICT COURT 2ND JUDICIAL DIST., CARBON CO., WY. T. }

J. W. MELDRUM,
Clerk.
By J. B. ADDOMS,
Deputy.

(Endorsed on back as follows:) Doc. 1, No. 106. Territory of Wyoming. In supreme court. Wyo. Nat. Bank, pl'ff in error, vs. T. J. Dayton, def't in error. Petition in error and transcript. Filed March 30th, 1877. J. W. Bruner, clerk sup. court. Kingman & Corlett, att'ys for pl'ff in error.

92 And on the said 30th day of March, A. D. 1877, there was a waiver of process and entry of appearance filed in said court in the cause aforesaid, in words and figures following, to wit:

Waiver of process and entry of appearance.

TERRITORY OF WYOMING:

In the supreme court.

THE WYOMING NATIONAL BANK, PLAINTIFF IN error,
vs.
THOMAS J. DAYTON, DEFENDANT IN ERROR.

I hereby waive the issuance of process in the above cause, and hereby enter the appearance of the above-named defendant in error in said court in said cause.

E. P. JOHNSON,
Att'y for Def't in Error.

93 (Endorsed on back as follows:) Doc. 1, No. 106. Wyoming National Bank vs. T. J. Dayton. Waiver of process and entry of appearance. Filed March 30th, 1877. J. W. Bruner, clerk sup. court. E. P. Johnson, att'y for def't in error.

And thereafter, at the regular March term, A. D. 1877, of the supreme court of the Territory of Wyoming, the following proceedings were had in said case, in the words and figures, viz:

94 March term, 1877.

WEDNESDAY, *April 25th*, 1877.

THE WYOMING NATIONAL BANK, PLAINTIFF IN error,
vs.
THOMAS J. DAYTON, DEFENDANT IN ERROR.

The court having had the argument made by counsel, the authorities cited by them and the record herein under consideration, and being now fully advised in the premises, it is now considered, ordered and adjudged by the court that the judgment of the court below be affirmed for the amounts claimed in the attachment writs, and if any interest has been computed in rendering said judgment below on the amounts claimed in the writs of attachment filed therein, it is ordered that said interest on said sums so claimed be stricken off by filing a remittitur in this case for the amount of said interest; and it is further
95 ordered by the court that a writ of procedendo issue to the district court of the second district, within and for the county of Carbon, directing said district court to enforce its judgment therein given, when said judgment is corrected, by filing the remittitur above set forth; and it is further ordered by the court that the said defendant in error have and recover his costs from the plaintiff in error in this behalf expended, taxed in the sum of $9.15, and that execution issue therefor.

And thereafter, to wit, on the 28th day of May, A. D. 1877, there was filed in said court in said cause a bond for supersedeas, in the words and figures following, to wit:

96 Supreme Court of the United States.

THE WYOMING NATIONAL BANK, PLAINTIFF IN error,
vs.
T. J. DAYTON, DEFENDANT IN ERROR.

Know all men by these presents, that we, the Wyoming National Bank and Edward Ivinson and Henry B. Rumsay, of Larimie City, in the Territory of Wyoming, are held and firmly bound unto T. J. Dayton in the sum of four thousand dollars, to be paid to the said T. J. Dayton, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, *heirs*, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this 26th day of May, A. D. 1877.

Whereas the above-named Wyoming National Bank hath pros-
97 ecuted a writ of error to the Supreme Court of the United States

to reverse the judgement rendered in the above-entitled action by the supreme court of the Territory of Wyoming.

Now, therefore, the condition of this obligation is such that if the above-named Wyoming National Bank shall prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

WYOMING NATIONAL BANK, [SEAL.]
By EDWARD IVINSON, [SEAL.]
President.
EDWARD IVINSON. [SEAL.]
HENRY B. RUMSAY. [SEAL.]

98 TERRITORY OF WYOMING,
County of Albany :

Edward Ivinson, being first duly sworn, on oath says that he is a resident of Wyoming Territory, and that he is worth the sum of two thousand dollars beyond the amount of all his debts, exemptions and liabilities, and that he has property liable to execution in said Territory equal to the sum of two thousand dollars.

EDWARD IVINSON. [SEAL.]

Subscribed and sworn to before me this 26th day of May, A. D. 1877

WYOMING TERRITORY, SECOND DISTRICT COURT, LARAMIE COUNTY.

J. W. MELDRUM,
Clerk District Court,
Albany County, W. T.

99 TERRITORY OF WYOMING,
County of Albany :

Henry B. Rumsay, being first duly sworn, on oath says that he is a resident of Wyoming Territory, and that he is worth the sum of two thousand dollars beyond the amount of all his debts, exemptions, and liabilities, and that he has property liable to execution in said Territory equal to the amount of two thousand dollars.

HENRY B. RUMSAY. [SEAL.]

Subscribed and sworn to before me this 26th day of May, A. D. 1877.

WYOMING TERRITORY, SECOND DISTRICT COURT, LARAMIE COUNTY.

J. W. MELDRUM,
Clerk District Court,
Albany County, W. T.

The foregoing bond approved by me this 28th day of May, A. D. 1877.

J. W. FISHER,
Chief Justice of the Supreme Court
of the Territory of Wyoming.

100 (Endorsed on back as follows:) Doc. 1, No. 106. Wyoming National Bank vs. T. J. Dayton. Bond for supersedias. Filed May 28th, 1877. J. W. Bruner, clerk supreme court. W. W. Corlett, att'y for plaintiff in error.

And thereafter, to wit, on the 29th day of May, A. D. 1877, there was filed in said court in said cause a citation, in words and figures following, viz:

UNITED STATES OF AMERICA, *ss:*

To T. J. Dayton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next *next*, pursuant to a writ of error filed in
101 the clerk's office of the supreme court of the Territory of Wyoming, wherein the Wyoming National Bank is plaintiff and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

J. W. FISHER,
Chief Justice of the Supreme Court of the Territory of Wyoming.

TERRITORY OF WYOMING,
County of Albany, ss:

I, C. B. Rott, of said county, being first duly sworn, on my oath do depose and say that on the 29th day of May, A. D. 1877, I served the within citation at Larimie City, in said county and Territory, by delivering to and leaving with M. C. Brown, esq., the attorney of rec-
102 ord of the within-named T. J. Dayton in the within-named cause, a true copy of this citation, the said T. J. Dayton not being in said Territory.

C. B. ROOT.

Sworn to before me and subscribed in my presence this 29th day of May, 1877.

H. B. RUMSEY, ALBANY CO., WYOMING TERR., NOTARY PUBLIC, SEAL.

HENRY B. RUMSAY,
Notary Public.

(Endorsed on back as follows:) Wyoming National Bank, pl'ff in error, vs. T. J. Dayton, def't in error. Citation. Filed May 29th, 1877. J. W. Bruner, clerk. W. W. Corlett, att'y for pl'ff in error.

103 And thereafter, to wit, on July 18th, A. D. 1877, there was filed in said court in the cause aforesaid the opinion of the court, in the words and figures, viz:

Error to the second judicial district, Carbon County.

WYOMING NATIONAL BANK, PLAINTIFF IN error,
vs.
T. J. DAYTON, DEFENDANT IN ERROR.

To the March term, A. D. 1877.

This action was brought in the district court of Albany County, and the venue changed to Carbon County; a trial was had, verdict rendered, and judgment entered thereon at the September term, A. D. 1876. It is brought here for review by the plaintiff below, who is now the plaintiff in error in this court.

It appears by the petition in this case that the plaintiff in error instituted an action of replevin in the district court of Albany County against the defendant in error to recover the possession of 500
104 cords of wood. The petition alleges that the plaintiff was the owner of said wood, and was entitled to the immediate possession thereof; that the defendant wrongfully and unjustly detained in his possession the said wood, and had so detained said wood from the plaintiff for the period of thirty days, to the damage of the plaintiff in the sum of five hundred dollars.

The answer of the defendant to the plaintiff's petition first sets up a general denial to all matters in said petition contained; second, denies that the plaintiff was the owner of the wood in question or was entitled to the immediate possession thereof, and further denies that the defendant ever took or held the wood in question, or ever unlawfully detained the possession of the said wood from the plaintiff; third, the defendant alleges that as the lawful sheriff of Albany County, and by virtue of certain writs of attachment issued out of the district court of said county directed to him, the sheriff of said county, against
105 one W. S. Bramel, he levied upon said wood as the property of said Bramel, and took the same into his possession; that at the time of the said levy the said Bramel was the owner of and in the possession of said wood, and by reason of said levy he, the defendant, as sheriff, had a special property in said wood to the amount of twenty-three hundred dollars for which he prayed judgment.

The wood in question, levied on by virtue of the writs of attachment, was delivered to the plaintiff.

W. W. Corlett for plaintiff in error.

E. P. Johnson, contra.

Justice Blair delivered the opinion of the court:

There are two questions which are necessarily raised by the pleadings in this case:

First. Was the plaintiff in error the owner of the wood in question and entitled to the immediate possession of the same at the time this suit was instituted?

106 Second. If so, did the defendant in error wrongfully detain the property in controversy from the plaintiff?

Before the plaintiff could recover, it is manifest that he must substantiate the first proposition by a preponderance of evidence.

The jury having found for the defendant in error and assessed his damages at $2,500.00, the plaintiff brings this case here upon a writ of error, in order that certain questions of law arising on the trial of the cause may be reviewed by this court.

The first, second, and third errors, as assigned by the plaintiff in error, involves questions of fact, the determination of which was the special province of the jury. The court will not set aside a verdict and grant a new trial upon the sole ground that the verdict is not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence to such an extent as to show that the verdict was the result of im-
107 proper motives (Minturn vs. Barr, 20th California, page 48).

After a careful examination of the evidence, as contained in the record, we are not only satisfied that the verdict is warranted by the evidence, but we find it difficult to see how the jury could have arrived at any other conclusion than they did.

As to the amount of damages assessed by the jury, we are of opinion that the measure of damages should have been for the aggregate amounts claimed in the attachment writs under which the sheriff seized the wood in question, and a remittiter is therefore directed to be filed by the defendant in the court below, covering the interest calculated by the jury upon said amounts, which amount we find to be five hundred and seventy-three dollars and twenty cents.

As to the fourth error assigned by the plaintiff in error, we are of the opinion that the plaintiff having put the title of said wood in issue by the pleadings, claiming his right of possession solely on that
108 ground in his petition, and by his testimony, the instruction complained of correctly states the law.

As to the other part of said instruction, the record shows that the writs were issued and served on the same day, and that no rights of third party intervene between the issuing and the service of the writs. The error, if it be error, is therefore harmless.

The fifth error assigned is as to the giving of the second instruction asked for by the defendant. It appears from the evidence in the case that no question is involved or arises between the vendor or the vendee, but solely between the vendee and the attaching creditors of the vendor. We think the instruction is applicable to the pleadings and evidence in the case. The plaintiff rests his right to recover possession of the wood in question on his absolute ownership, derived or acquired by an unconditional purchase from W. S. Bramel. It is not claimed that there was a delivery of the wood, and the record shows that the full and absolute control and possession of the same was publicly and pri-
109 vately retained by Bramel after the alleged unconditional sale. And while it is held in many States that the retention of possession of personal property by the vendor, after an unconditional sale, is only prima facia a fraud, the Federal courts hold it to be a fraud in law, and as against creditors and bona fide purchasers renders the sale void (1st Smith's Leading Cases, 523; 1st Craunch, 309–316; 4th Mason's C. C., 312; 2nt Kent, 12th edition, 515 to 532).

The Supreme Court of the United States being the appellate court to which this case must go if appealed, we feel bound by its decisions and shall so hold in this case. In that view there is no error in the instructions.

But there is another view of the case, which we take, that, without reference to the merits of the instructions complained of, renders the question raised by it immaterial and the instruction itself harmless, even if erroneous.

The jury unquestionably found from the evidence that there was no sale of the wood by which title or right of immediate possession to it passed to the bank.

110 We think the preponderance clearly shows that there was nothing more than an arrangement made by which, when Bramel had delivered 500 cords of wood to the railroad company, the proceeds were to go to the bank.

We find no error in giving the instruction number three, complained of as the sixth error.

The remitteter ordered disposes of the objection made to the fourth instruction asked for and given at the request of the defendant.

We find nothing in the record making it necessary to examine the other errors complained of, as some we think are inapplicable, and otheres

were not seriously insisted on in the arguments of the cause. For this reason they are overruled.

Judgement affirmed.

(Endorsed on back as follows:) Doc. 1, No. 105. Wyoming
111 National Bank, plaintiff, vs. T. J. Dayton, defendant. Opinion by Justice Blair. Filed July 18th, 1877. J. W. Bruner, clerk.

And thereafter, to wit, on the 6th day of August, A. D. 1877, there was filed in said court in said cause a remittiter in words and figures as follows:

In supreme court of Wyoming Territory.

WYOMING NATIONAL BANK }
vs. }
T. J. DAYTON. }

Now comes the defendant in error herein and gives notice that he, in conformity with the opinion of the court herein, hereby enters a remittiter herein and remits from the amount of the judgement in
112 the court below in his favor the sum of five hundred and seventy-nine dollars and twenty cents.

E. P. JOHNSON,
Att'y for Def't in Error.

(Endorsed on back as follows:) In supreme court. Wyoming National Bank vs. T. J. Dayton. Remit'itter. Filed August 6, 1877. J. W. Bruner, clerk sup. court. E. P. Johnson, att'y for def't in error.

113 TERRITORY OF WYOMING, *ss:*

I, J. W. Bruner, clerk of supreme court of the Territory of Wyoming, do hereby certify that the above and foregoing contain a true and correct copy of the petition in error, transcript, waiver of process, and entry of appearance, journal entry of the judgement, bond for supercedias, citation, opinion, and remitteter in the above-entitled cause, so full and entire as the same remains upon the records and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne, this 19th day of August, A. D. 1877.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court of the Territory of Wyoming.

114 TERRITORY OF WYOMING, *ss:*

I, J. W. Fisher, chief justice of supreme court of said Territory, do hereby certify that J. W. Bruner, by whom the foregoing attestation was made, is, and was at the time of making the same, the clerk of said supreme court, duly qualified and authorized as such clerk, and that he is the proper custodian of the books and records of said court, and that the seal attached to said certificate is the seal of said court, and that all the official acts of said clerk are entitled to full faith and credit in all courts of record as well as elsewhere, and that said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Witness my hand and seal this day of August, A. D. 1877.

[SEAL.] J. W. FISHER,
Chief Justice Supreme Court Wyoming Territory.

115 TERRITORY OF WYOMING, *ss:*

I, J. W. Bruner, clerk of supreme court of Wyoming Territory, do hereby certify that J. W. Fisher, esq., whose name is subscribed to the foregoing attestation, is, and was at the time of so doing, duly commissioned and qualified as chief justice within and for the Territory aforesaid; that all his official acts as such are entitled to full faith and credit; and that said attestation is in due form of law, and that his signature thereto is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne, this 19th day August, A. D. 1877.

[SEAL.] J. W. BRUNER,

Clerk of Supreme Court of the Territory of Wyoming.

Cost of transcript, $34\frac{25}{100}$.

(Indorsement on cover:) No. 276. The Wyoming National Bank, pl'ff in error, vs. Thomas J. Dayton. Wyoming Ter't'y sup. court. Filed 12th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 9 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

THE WYOMING NATIONAL BANK, Plaintiff in Error.

vs.

THOMAS J. DAYTON, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

In Support of Motion to Dismiss the Writ of Error.

Statement of Case.

This was an action in replevin, or for the unlawful detention of personal property, under the civil code of Wyoming Territory.

The proceedings were begun in the District Court of the Second Judicial District of Wyoming, on January 22nd, 1874, by the Wyoming National Bank, plaintiff in said proceedings (now plaintiff in error), against Thomas J. Dayton, defendant therein (now defendant in error), to recover the possession of five hundred cords of wood, alleged to have been unlawfully detained by defendant Dayton.

On the 22d day of September, A. D. 1876, the cause having been regularly tried and verdict returned by a jury, judgment was rendered in favor of defendant Dayton, for $2500.00 damages, and $377.55 costs of suit.

This judgment under the code, being for the value of defendant's interests in the said four hundred cords of wood, the wood having been delivered to the plaintiff, the Wyoming National Bank, on the writ of replevin, and no return thereof under the statute being permitted.

From this judgment the plaintiff, the Wyoming National Bank, took the case to the Supreme Court of Wyoming Territory, by petition in error, where the case was again heard at the March, A. D. 1877, term thereof, on the 25th day of April, 1877, and judgment of the court below was affirmed, defendant being ordered to file a remission for interest computed by the jury; which was accordingly done on the 6th day of August, 1877, in the sum of $579.20, leaving the affirmative judgment ot the court in favor of defendant Dayton for the sum of $1920.80.

From this judgment in case below, the plaintiff in case below brings the said cause to this court by writ of error to the October, A. D. 1877, term.

The defendant in error, Thomas J. Dayton, moves to dismiss the writ of error, upon two grounds, the first of which is as follows:

There is not annexed to and returned with the writ of error an assignment of errors and prayer for reversal, as required by law.

The index to the printed record discloses the fact that no assignment of errors is to be found therein.

[See leaf preceding page 1 of printed record.]

A further examination of the printed record discloses the same fact, viz: There is no assignment of errors in the record.

The petition in error found on page 1 of printed record, is the petition in error filed with a transcript of the record of the District Court of the Second Judicial District, on which said action was brought into the Supreme Court of Wyoming Territory, and was there heard.

It, therefore, must not be taken as an assignment of errors to this court.

[See printed record, pp. 1 and 2.]

The writ should be dismissed on motion where no assignment of errors is returned with it.

See Sec. 997, Second Edition Revised Statutes.
Also Maxwell vs. Stewart, 21st Wallace, page 71.

This defect cannot be supplied by amendment of the writ.
This defect is in the substance, and not in the form.

See Sec. 1005, Second Edition Revised Statutes.

The second ground of the motion is jurisdictional:

That no showing on oath is made that the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars.

Without such showing the cause cannot be heard in this court.

See Sec. 702, Second Edition Revised Statutes.

Stephen W Downey

M. C. Brown,
Att'y for Defendant in Error.

OFFICE SUPREME COURT U.S.
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IN THE

Supreme Court of the United States

No. 276.

THE WYOMING NATIONAL BANK, Plaintiff in Error,

vs.

THOMAS J. DAYTON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

BRIEF FOR PLAINTIFF IN ERROR.

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 276.

THE WYOMING BANK, PLAINTIFF IN ERROR,

vs.

THOMAS J. DAYTON, DEFENDANT IN ERROR.

In Error to the Supreme Court of Wyoming Territory.

BRIEF FOR PLAINTIFF IN ERROR.

The facts which are not susceptible of controversy in this case, and which are material to the points we shall consider, are in substance the following:

1. On 22d of January, 1874, the plaintiff brought, in the District Court of Wyoming Territory, against Thomas J. Dayton, sheriff of Albany county, an action of replevin for five hundred cords of fire-wood, described as being in the wood-yard of the Union Pacific Railroad in Laramie City, which the petition alleged the plaintiff owned and was entitled to the possession of, and which the defendant wrongfully detained, &c. (Record, p. 3.) The property replevied was delivered to plaintiff.

2. On 3d February, 1874, the defendant filed answer; and on 6th May, 1874, he filed amended answer; (Record, pp. 4–6;) and the substance of these answers is, (1) to deny

the averments of the petition; (2) denial of plaintiff's ownership, its ever being in possession, and denies the wrongful detention; (3) avers that at, before, and after 17th December, 1873, defendant was sheriff, and on and about that day levied sundry-named attachments on said wood as the property of W. S. Bramel, defendant in attachment, for the aggregate sum of $1,926.80, and that at the commencement of the replevin defendant rightfully held the wood under said attachments so levied when Bramel was owner and in possession, and that by virtue of such levies defendant had a special property in the wood to satisfy said claims, amounting to $2,300.

3. The case was, on the 19th September, 1876, (Record, p. 28,) submitted to a jury upon the evidence and the charge of the court, and the first verdict (Record, p. 25) was a general verdict for defendant, assessing the damages at $1,900 and interest from day of replevin; and the court gave additional directions to the jury and sent them out to correct their verdict, whereupon the jury returned the second verdict, (Record, pp. 25–28,) the plaintiff having duly preserved exceptions to so sending out the jury for a second verdict, and also to the substance of the verdict. (Record, p. 25.)

4. On the coming in of the verdict plaintiff filed a motion for a new trial, on the grounds stated in the record at pages 26 and 27.

5. On 22d September, 1876, this motion was overruled and a judgment rendered for $2,500 and $377.55 costs.

6. The case was appealed to the Supreme Court, and 25th April, 1877, the judgment of the District Court was affirmed so far as to direct a judgment below for the amount claimed in the attachments, with directions to remit interest, if any were allowed in the judgment below, (Record,

p. 30,) which interest so included the opinion finds to be $573.20; (Record, p. 34;) and the case is duly removed to this court.

7. The bill of exceptions extends from page 7 to page 27 of the printed record, and purports to set out all the evidence submitted to the jury, (Record, p. 21,) as well as all exceptions, charges asked and given and refused.

We shall not attempt to analyze the evidence, but here state the result of the proofs as given by the respective parties touching the plaintiff's interest in the property replevied.

According to the plaintiff's testimony said W. S. Bramel, on 30th October, 1874, (Record, p. 7,) owed plaintiff, in all, about $2,100, and then applied to plaintiff for $500 more to enable Bramel to deliver such wood at said railroad's wood-yard, to which he had sold 500 cords at $5 per cord, to have been delivered in the preceding August. After negotiations, an agreement resulted by which the said railroad company, the said bank, and said Bramel mutually agreed that Bramel should receive from the bank an additional advance of $400 on the said 500 cords; should sell, at $5 per cord, said wood to the bank; should deliver it at said company's wood-yard for the bank; the said railroad company should purchase said wood from the bank and receive it at said yard for the purchaser; the railroad should issue to the bank the vouchers therefor, and pay the bank the said price of such wood so to be delivered; and Bramel's debt, including said $400 so then to be advanced, should thus be discharged. (Record, pp. 7–11.)

Under this contract the $400 was then advanced on the wood, and Bramel proceeded to deliver the wood at said wood-yard under said agreement of 30th October, and according to defendant's own testimony (Record, p. 14) 410 cords had been so delivered at said yard before the levy of the attachments.

The defendant's testimony does not differ from the plaintiff's in any material particular in its results, except that it seeks to deny that anything was said about an actual *sale* to the bank. It agrees with plaintiff's evidence as to the prior indebtedness to the bank—the negotiations for an additional advance—the agreement between the railroad company, the bank, and Bramel—that the wood should be so delivered at said yard, vouchers issued to the bank, and money paid to the bank—including the $400 additional advance—the price to be $5 per cord, and Bramel's debt to the bank be thus discharged. Defendant's evidence also shows that under such tripartite agreement said $400 advance was made, and 410 cords of said wood were delivered before any attachment was levied.

All these proofs were delivered to the court and jury by the parties respectively *without any allegation on the part of the defendant that any of the evidence was at variance with the pleadings*, or that the defendant was *surprised* or *misled*. No exceptions were taken on this ground by the defendant, and none, of course, *could* be taken by him to the evidence which he himself introduced under the pleadings and issues.

STATUTES.

Section 180, chapter 13, Civil Code of Wyoming Territory: "In all cases where the property has been delivered to the plaintiff, when the jury shall find upon issue joined for the defendant, they shall also find whether the defendant has the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, including his attorney's fees, for which, with costs of suit, the court shall render judgment for the defendant against the plaintiff and his sureties."

Affidavit must show, &c. (section 171): "First. A description of the property claimed. Second. That the plaintiff is the owner of the property or has a special ownership

or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property."

Section 111, p. 47: That "in the construction of any pleading, for the purposes of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties."

Section 127 (Compiled Laws, p. 49): "No variance between the allegations in the pleadings and the proofs is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action of defense upon the merits."

Whenever it is alleged that a party has been misled, that fact must be so proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just.

Assignment of Errors.

There is error in the proceedings and judgment in the following things:

1. In sanctioning and giving charges asked by the defendant—numbers 1, 2, 3, and 4. (Record, pp. 21 and 22.)

2. In sustaining the ruling of the District Court refusing to give to the jury instructions numbers 6, 7, and 10. (Record, p. 22.)

3. In sustaining the District Court's action in overruling the plaintiff's motion for a new trial.

4. In sustaining the District Court's ruling in holding that the verdict in this case was sufficient in substance and in form.

5. In sustaining the District Court's ruling in refusing to suffer the plaintiff to have the benefit of the evidence establishing the plaintiff's special interest in the property in controversy.

6. In sustaining the action of the District Court in ordering the jury to find a second verdict.

7. In undertaking to correct the verdict and judgment of the District Court without the requisite means and data to enable the correction to be made according to law, and thus seeking to avoid a reversal of the erroneous judgment.

8. In rendering a judgment affirming the judgment of the District Court, when the judgment should have been reversed.

9. For other manifest errors in the record.

Brief.

I. The attaching creditors and the defendant could acquire no higher or better interest in this wood than Bramel held at the date of the attachment; and if, at that date, a special interest, property, or lien existed in favor of the bank and against Bramel, whereby the bank's agent (the railroad company), and hence the bank, was entitled to the possession of the property, then the attachment could not rightfully either destroy such lien or usurp said possession.

Besides being very evident, this proposition is expressly asserted by all authorities which touch the point, and is so expressly laid down in

Samuel *v.* Agnew, 80 Ill., 553.

II. The agreement of 30th October, 1874, whereunder the plaintiff advanced the four hundred dollars on this wood, and under which, before the attachments, at least 410 cords were delivered to said railroad company for the plaintiff, and for which vouchers were to be delivered to the bank, and such bank to be paid said five dollars per cord in extinguishment of all debts and advances to and by the bank, establishes, as a matter of law, if not an out and out sale to the bank, then at least a valid special property in

this wood, and right of immediate possession in the bank which is not affected by the attachments.

The transaction, viewed in the light of the defendant's evidence alone, amounts to an agreement by Bramel to deliver the wood to the bank by a delivery to the agent of the bank (the railroad company), which became purchaser from the bank and Bramel of the wood. That such agreement and delivery to such agent resulted in at least a lien for the $2,500 (granting that there was no outright sale) is utterly plain.

The possession necessary in order to the enforcement of this lien (by contract) "may be either actual or constructive; and for this purpose *a delivery to a servant of the pledgee is effective.*"

3 Parsons on Contracts, side page 272.
Falkner *v.* Case, 1 Bro. C. C., 125.
Reeves *v.* Copper, 5 Bing. N. C., 136.

That a lien, as in favor of a pledgee, bailee, factor, or consignee who has made advances or bestowed labor upon the property delivered to such pledgee, &c., attaches to the property, is an equally indisputable proposition of law.

Wood *v.* Nixon, Addison, 134.
Harlan *v.* Harlan, 3 Harris, 513.
Boyle *v.* Rankin, 10 Harris, 170.
Peters *v.* Elliott, 78 Ill., 321–327.
Beecher *v.* Bennett, 11 Barb., 374.

That the plaintiff could maintain the action of replevin for the recovery of this property, provided he had a valid "special interest or property" therein, in the nature of a lien upon the same, is not denied, and cannot be.

The statute of Wyoming expressly gives such right of action as above set out, (sec. 171,) and such is the settled law, independently of the statute. And see

Peters *v.* Elliott, 78 Ill., 321.

Clark *v.* Martin, 120 Mass., 543.
Samuel *v.* Agnew, 80 Ill., 533.
Waterworks *v.* White, 35 Mich., 77.
Hopper *v.* Miller, 76 N. C., 402.

We are thus brought to the question whether the court erred in directing the jury as set out in the first instruction (Record, p. 21) asked by the defendant.

That instruction was, in substance, that under the pleadings plaintiff could not recover in virtue of the "special ownership or interest," which the evidence of even the defendant established, and must show a right of possession arising out of an absolute ownership. (See, also, court's opinion, Record, p. 34.)

This, we submit, is manifestly erroneous. In support of this we direct attention to the following considerations:

1. Assume that there was a *variance* between the proof of the plaintiff's perfect right of recovery, which even the defendant's proofs showed, in showing a lien for the $2,500, and which interest, *at least*, was also shown by plaintiff's proofs, and the right of recovery stated in the petition as one arising from *ownership*, then, still, this was, if so much, *only a* "*variance*," and was not a failure of proof. It made out a complete right of possession and of recovery in that action, and most manifest justice required that such recovery should be had in the case, if that were *possible* under the law. The result of the judgment for defendant was to take one person's property, to the extent of the $2,500 prior lien, and give it to another. The law will never do this if it can be avoided. We submit that such result could not only have been avoided, but it was reached in violation of the express words of the statute.

Section 111, p. 47, (see above,) of the Wyoming Code requires that the allegations of pleadings shall be liberally construed in the interest of justice. And section 127 (see

above) peremptorily requires that "no variance between the allegations and the proofs shall be deemed material unless it have actually misled the adverse party to his prejudice"; and if so misled, that must be shown, and also wherein; and thereupon the court may direct an amendment.

Now, in this case, the record shows that the plaintiff's evidence established, if not an absolute sale then, *at least* a perfect right of recovery in virtue of the special ownership or interest—a lien for $2,500—and the evidence of the defendant showed the same thing. Not a word of objection to this evidence on the ground of *variance* is shown by the record—no allegation of surprise, of being misled—or any attempt to prove this. Except in the request for instruction to the jury, there is no hint that any *proved* right of recovery was not available under the pleadings.

Such being the record, then, to hold that, where the proofs of *both* parties showed a perfect right of possession in the plaintiff, and of recovery in the action, such recovery shall be defeated and gross injustice done because such proofs showed a right of recovery variant from the one named in the petition in this only, to wit, that the proofs showed a right of possession arising out of a special interest or ownership, whilst the petition showed a right of possession arising from ownership generally, is to defy the express terms of section 127, which prohibits such a *waived* variance from being treated as "material," and is to disregard the 111th section, which requires the averment of the petition saying that the plaintiff's right of possession was that of an "owner," to be construed liberally and as including a special owner.

2. That the defendant waived all objections to the proofs showing a right of recovery, based on the ground that these varied from the petition, cannot be denied; because (1) such waiver is enacted by the express terms of section 127;

and (2) such waiver is accomplished by the defendant's act in putting in the evidence which establishes the plaintiff's lien and right of possession. And of course the evidence introduced by defendant is available for plaintiff in so far as it tended to show a case for the plaintiff. (See Jackson *v.* Hale, 14 How., 527.)

Now, that, where there is such a waiver of this alleged variance, the plaintiff should have been allowed to recover, is shown not only by the plain reason and justice of the case and the decisions we have above cited, but is, in substance, decided in such cases as

Tucker *v.* Donevan *et al.*, 13 Kans., 251.

The substance of this last-named case, so far as relates to this point, is found in the fifth proposition of the syllabus, in these words:

"Where a petition in replevin alleges absolute ownership, and the findings of fact show the right derived from a stoppage *in transitu*, and it does not appear that any objection was made to proof of this kind of interest in the property, and no motion was made for a new trial, and it does not appear that the attention of the District Court was in any way called to the variance, this court will not, on that account, reverse a judgment sustained by the findings, notwithstanding the discrepancy between them and the petition."

Robinson *v.* Fitch, 26 Ohio St., p. 664, the court says:

"We think that he" (the plaintiff in replevin) "should not be prejudiced by having erroneously denominated the character of his title or ownership."

What has now been stated, as seems to us, renders the judgment of the Supreme Court manifestly erroneous, in that it sustained the action of the District Court in refusing to give charge No. 10 (Record, p. 22) asked by plaintiff, and in giving charge No. 1 (Record, p. 21) asked by defendant; and for this reason we do not deem it best to go over the various other assignments of error, but beg the court's

attention to them, respectively, should their examination become material.

THE VERDICT BAD.

There is one other assignment of error, to wit, that relating to the form of the verdict, to which we invite attention. That verdict, as corrected, is in these words:

"We, the jury, find for the defendant. We also find that the defendant *had the right of property by possession only* at the commencement of this suit, and assess his damages at twenty-five hundred ($2,500.00) dollars."

This verdict was duly excepted to. It finds nothing as to who had the right of possession. It finds that defendant had no right of property save such as is given by the mere fact that he was in possession of it. It finds nothing as to the rightfulness of that possession which the verdict finds created, and measured the extent of the only right of property which the defendant had.

The verdict as to these things, so specially required by section 180 of the Wyoming Code to be found by the jury, is unalleviated nonsense.

And that the failure of the jury to comprehend this part of their duties resulted in a substantial error injurious to the plaintiff, is shown by their assessment of damages wholly at war with the verdict's findings, and so at war with the law that the Supreme Court of the Territory was compelled to order a remittiter. (Record, p. 34.)

The Supreme Court of Wyoming Territory has in another case (Gregory *v.* Morris, 1 Wyoming R., p. 222,) held:

"That where, in replevin, the defendant recovers and the property had been delivered to the plaintiff, the jury need not in their returned verdict find anything as to the right of possession or the right of property, but that section 180" (see *supra*) "was satisfied by the jury's taking these into consideration in making up the damages."

It must have been in obedience to this doctrine that the court, in the present case, held the verdict sufficient.

It is, we submit, impossible for this court to sustain any such doctrine or this verdict.

It simply overrules the statute. It defies all reason which demands in every such case (to here adopt the words of the Supreme Court of Ohio) that "the verdict should be clear and intelligible, so that the court may ascertain from its terms what judgment to render."

In this case (Hewson *v.* Saffin, 7 Ohio R., part 2, p. 232) the court held that the jury must in replevin find whether they base their verdict on the right of property or the right of possession. And see 6 Otto 626

This the Wyoming court in Gregory's case disapproves; but we think this court will not feel warranted in sanctioning a practice which will excuse the jury from returning to the court the means of finding out to whom the jury deemed the property to belong, the extent of the interest found, or will deprive the court of all means of knowing whether the damages were based on substance, were excessive or inadequate, or whether the basis on which the damages were awarded was one warranted by the evidence.

Such a holding overrules the practice which has prevailed for generations, defies the statutes of Wyoming, and will result in great mischief.

The parts of the present verdict are so repugnant to each other, as we have above stated, as that they either result in nonsense or in nothing. Such a verdict is intrinsically void.

Stearns *v.* Barrett, 1 Mason, 169.
Bemus *v.* Beekman, 3 Wend., 667.

For these reasons, we submit, the judgment of the Supreme Court must be reversed.

SHELLABARGER & WILSON,
Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
FILED
APR 22 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the U. S.

October Term, 1879.

THE WYOMING NATIONAL BANK,
Plaintiff in Error,
vs.
THOMAS I. DAYTON.
No. 276.

Brief for Defendant in Error.

W. A. MAURY,
for Deft. in Error.

R. O. POLKINHORN, Printer, Washington, D. C.

Warner v Nolan
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Supreme Court of the U. S.

October Term, 1879.

THE WYOMING NATIONAL BANK,
Plaintiff in Error,
vs.
THOMAS I. DAYTON.

No. 276.

Brief of Wm. A. Maury, for Defendant in Error.

The Case.

That there was no pretence of a sale of the wood to the bank, supposing the bank had the power to purchase it, is put beyond question by the fact that Bramel, the alleged vendor, *gave his notes* for the money he received from the bank. *Res ipsa loquitur.*

That there was no purpose on the part of the bank to get a lien on the wood is apparent from the bank's omission to take any step to secure such a lien as would be valid against third persons, and as ordinary prudence would have suggested.

The most that the parties sought to attain was to procure the Railway Company's consent to pay the price of the wood to the bank so soon as Bramel delivered to the Company the 500 cords he had contracted to deliver. In other words, what the parties sought and obtained was the Rail-

way Company's conditional acceptance of Bramel's order in favour of the bank.

The contentions that there was a sale to the bank or a lien created in its favor were afterthoughts for the purpose of frustrating the attachments.

Of the assignments of error made by the plaintiff in error three only are pressed and relied on, namely (1), the granting of the first instruction (R., p. 21); (2), the refusal of the tenth instruction (R., p. 22); and, (3), the refusal of the Supreme Court to reverse the judgment on the ground of the alleged invalidity of the verdict.

First Instruction.

The objection to this instruction turns on so much of it as lays down, that under the pleadings and evidence, the plaintiff can not recover, except by establishing that it was the owner of the wood in question, and that its right of possession depended on title and ownership.

The soundness of this instruction must be determined by reference to the petition (R., p. 3), in which it will be seen, that the plaintiff avers, that it is "*the owner*" of the property in which the suit was brought.

Such being the case made in the petition, the court could not do otherwise than tell the jury, that inasmuch as the bank had averred in its petition, that it was entitled to the posession of the wood, *because it was the owner of it*, the bank could not recover without proving it was the owner.

In what country administering justice on fixed principles is it not law that a plaintiff or *actor* can only recover *secundum allegata et probata?* It is familiar that in equity even no relief will be afforded under the prayer for general relief, unless it be the outcome of the case stated in the bill.

If, however, a judgment may as well rest on matter extraneous to the record as on the record, why have a record at all, or, at least, any more of one than the names of the parties, and the entry of judgment?

It is obvious that if the loose practice contended for by the counsel opposite is to prevail, the utility of records as evidence to support pleas of *res adjudicata* and estoppel would be entirely destroyed, and the effectiveness of a judgment for such purposes would often depend on the party's ability to preserve the extraneous evidence necessary to establish the state of facts in which the judgment was founded.

But the learned counsel opposite rely with confidence on the territorial statute of jeofails, under which, they say, the court was bound to tell the jury that, although the bank should have shown that it had only a *lien* on the wood as security for money lent to Bramel, they could find for the plaintiff.

Certainly this court would require a statute to be very explicit before it would countenance a reading of it involving such a revolution in procedure as giving a plaintiff the right to recover on a case essentially different from that stated in his petition. Indeed, it might be doubted whether a law intended to have this effect, and subversive of a great principle of natural justice could have any validity at all.

But we deny that the Statute of Wyoming has any such meaning as is attributed to it. Its intention is merely to do away with amendments for variance, except where a party can show he has been misled to his prejudice—that is, misled by his adversary's *maintaining his pleading* by evidence in some particulars, but not essentially, variant from such pleading. The Statute cannot be understood to refer to cases where the pleading presents one case and the evidence another, because it must be taken as in subordination to the principle that a party must present his case in his plead-

ing, and because no statute can have such an interpretation, unless it is unavoidable, and, perhaps, not even then.

Now, if the opposite view be correct, it must follow that, under this Statute, a party suing in replevin for a horse may recover on evidence showing that the defendant detains his *cow*, unless the defendant can show that he has been misled by the variance, a doctrine which would barbarize civil procedure.

The cases cited on this point do not support it. Supposing the case in 13 Kansas, 251, to be sound, it is not applicable, because in that case no attention was called to the variance below. In the case at bar, the bank's evidence was objected to on the ground of *irrelevancy*, (Rec., p. 11—). The objection referred to occurs in a deposition, and no doubt the same objection was made to all of the plaintiff's evidence. If not, the plaintiff in error should have had the fact stated in the bill of exceptions. As it is, his statement in this behalf is unsupported.

The case of Robinson *vs.* Fitch, 26 Ohio St., 664, is not in point, because in that case the plaintiff had set forth *all the facts of his case in the petition*, but erroneously stated the character of his title, as deduced from the facts stated.

The law of Wyoming requires that the petition shall contain "a statement of facts constituting the cause of action, in ordinary and concise language and without repetition." (Compiled Laws 1876, p. 44, Sec. 81). If the plaintiff had observed this law in preparing its petition all difficulty as to variance would have been avoided.

The Tenth Instruction.

This is the converse of the first instruction, and the granting of the latter involved the rejecting of the former. Furthermore, the instruction was objectionable, because abstract; there being no evidence tending to show any

purpose to give the bank a lien on the property, or do more than to assign to it the amount to be paid by the Railway company on the delivery of the wood by Bramel.

But supposing there is any such evidence, it could not possibly amount to a valid lien against creditors, there being no change of possession and no instrument recorded in obedience to the territorial Statute, which provides that "no mortgage on personal property shall be valid as against the rights and interest of any third person or persons, unless possession of such personal property be delivered to and remain with the mortgagee or the said mortgage be acknowledged and filed as hereinafter directed" (Compiled Laws, 1876, p. 175, Ch. 2, Sec. 1); and the sixth section extends the provisions of the first section to "bills of sale, deeds of trust, and other conveyances," intended to create liens on personal property.

The Verdict.

The verdict gratified the requirements of the statute that where the jury find for the defendant "they shall also find whether the defendant has the right of property or the right of possession only at the commencement of the suit." The jury found that the defendant "had the right of property by possession only at the commencement of the suit," which very obviously means that the defendant's right depended on possession only, and that he had such property as possession gave. If the defendant had been an ordinary pledgee or depositary the finding would have been strictly correct, why then should it be bad in the case of a sheriff holding property under an attachment?

Manifestly, the bare possession of a trespasser is a sufficient defense as against every one but the true owner; and the jury found that the bank was not the true owner, and, therefore, had no right to disturb the defendant's possession.

The attempt to make out a delivery of the wood by mak- the railway company the agent of the bank, is wholly without warrant in the record.

When the attachments were laid, there had been no delivery of the wood to the company for any purpose (Rec., p. 19, C. W. Bramel's Dep., Shankland's Dep., p. 13). The company refused to receive less than the 500 cords it had agreed to buy, and would have accepted no delivery of the wood except as vendee.

As the counsel opposite lay no stress on the remaining assignments of error, we do not deem them of sufficient importance to require any special notice from us.

W. A. MAURY,
for Deft. in Error.